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Supreme Court of the United States.

OCTOBER TERM, 1908.

Nos. 396, 397, 398.

WILLIAM R. WILLCOX ET AL., constituting the Public Service Commission of the State of New York for the First District, THE CITY OF NEW YORK and WILLIAM S. JACKSON, as Attorney General of the State of New York,

Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

BRIEF FOR APPELLEE

UPON THE FACTS.

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No. 396.

WILLIAM R. WILLCOX ET AL, Constituting the Public Service Commission of the State of New York for the First District,

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CONSOLIDATED GAS COMPANY OF NEW YORK,

No. 397.

THE CITY OF NEW YORK,

Appellant,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

No. 398.

WILLIAM S. JACKSON, as Attorney General of the State of New York,

Appellant,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

Brief for Appellee upon the Facts.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

This Brief will deal with the questions of Fact, suggested by the Assignments of Error.

The general legal propositions involved in the appeals, and also the subject of Franchises and Good Will, will be considered in separate Briefs.

ORGANIZATION AND HISTORY OF APPELLEE.

The Appellee, the Consolidated Gas Company of New York, came into existence on November 10, 1884, pursuant to Chapter 367 of the Laws of 1884 of the State of New York, through the consolidation of six Companies then operating on the Island of Manhattan (*Record*, pp. 152, 4819).

Said six Companies, The New York Gas Light Company, The Municipal Gas Light Company, The Metropolitan Gas Light Company of the City of New York, The Manhattan Gas Light Company, The Knickerbocker Gas Light Company, and The Harlem Gas Company, had been organized at different dates from 1823 down (*Record*, pp. 153, 4826, 4829, 4830, 4852, 4857, 4862, 4863, 4867).

Original Assets and Capitalization.

Said Act of 1884 authorized the capitalization of the Consolidated Company at an amount not exceeding "*the fair aggregate value of the property, franchises and rights of the several Companies thus to be consolidated.*"* The authorized capital was fixed in the Consolidation Agreement (exclusive of the New York Mutual Gas Light Company, which was named therein but did not enter) at $39,078,000, being the market value of the Capital Stock and securities of the six constituent Companies at the time of consolidation (*Record*, pp. 153, 5384). This amount was apportioned (*Record*, pp. 153, 5018) as follows :

Value of tangible property, to wit : Real Estate, Plants, Mains, Services, Meters and Office Furniture, as appraised in the summer of 1884, *exclusive of working capital*	$29,994,000
Franchises and Rights	7,781,000
	$37,775,000
Leaving for acquisition of working capital	1,303,000
Total authorized capital	$39,078,000

* *All italics* in this Brief are ours.

Said appraisal of the tangible property at $29,994,000 was made by an expert contractor of high character and experience (*Record*, p. 796), was painstaking and in great detail (*Complainant's Ex. 70, Record*, pp. 4925-5017), and was affirmed by a Committee of the New York Senate appointed to investigate the subject and reporting in 1886 (*Record*, pp. 5325, 5384, 5387); while said Committee found that the franchises of *four* of the six constituent Companies were "worth much more than" said sum of $7,781,000 (*Complainant's Ex. 227, Record*, p. 5386).

Capital Stock to the amount of $37,775,000 was immediately issued by Appellee in acquisition of said assets,—less $2,329,000 thereof retained by Appellee to retire outstanding obligations of the constituent Companies to a like amount and $15,940 for sundry adjustments,—or to a net amount $35,430,060 (*Record*, pp. 153, 4496, 5731).

Increase of Capital Stock.

In the year 1900, Appellee's Capital Stock was increased to $54,595,200, and then to $80,000,000, the greater part of such increase being employed in the acquisition of securities of other gas and electric lighting Companies in the City of New York. The entire $80,000,000 were issued and outstanding at the time of the beginning of this action (*Record*, p. 154).

It is impossible to measure the cost to Appellee, and much less the present value, of Appellee's assets, whether property employed in its gas business or securities of other Companies, by the par value of its Stock issued to acquire the same; for all of its Stock, except that issued as aforesaid at consolidation in 1884, has been issued at $150 or above—some of it as high as $232—per share (*Record*, pp. 154, 849, 854).

In 1904, Appellee's authorized capital was further increased to $100,000,000, for the purpose of taking up about $20,000,000 in Debentures issued by it in 1904, and convertible on and after July 1st, 1907 into its Stock at par at the option of the holder. None of this additional $20,000,000 of Stock was outstanding at the date of the trial (*Record*, pp. 154, 5047).

Growth of Gas Business and Assets.

The sales of Appellee for the first year of its operation (1885) were 3,942,433,000 cubic feet; and for the year 1905 were 13,283,163,767 cubic feet, of which the Appellee produced in its own plants on the Island of Manhattan 10,419,461,426 feet, and acquired from subsidiary Companies 2,863,702,341 feet (*Record*, pp. 217-20, 5039).

The record shows, as would be expected, that the assets of Appellee, employed in its gas business, have likewise increased largely, but not in the same proportion, since Appellee's plants in 1885 considerably exceeded in capacity the amount of its sales for that year (*Record*, pp. 1714, 4580, 6079, 6086, 6115, 5039, *post*, p. 116), while at present its sales have far surpassed their capacity.

Estimates of the value of the property employed in Appellee's gas business were presented in behalf of both the Appellee and the Appellants, but differed widely in the aggregate, since Appellants wholly excluded various large items (such as "franchises") which were included by Appellee (*Record*, pp. 155, 199). These estimates were the subject of most careful consideration by the Master and the Court (*Record*, p. 155),—with the result that they each reached a total valuation considerably less than claimed by Appellee, but much above that urged by Appellants.

The claims of Appellee, and each of the Appellants, as to the property employed in Appellee's gas business, and as to the value thereof, are set forth in an "Appendix" to this Brief.

A.

THE ASSIGNMENTS OF ERROR.

The questions of fact raised in the Assignments of Error will be discussed in what seems to be a natural and logical order.

It is impossible to consider them in numerical order, since Assignments of the various Appellants relating to the same subject matter are not arranged in like order. The important Assignments of The City of New York, and all the Assignments of the other Appellants, so far as they deal with the *Special Facts* in this case, as distinguished from general legal principles, are—however—believed to be covered in this Brief.

We do not understand any Assignment to question the finding that the "*present value*" of Appellee's existing "Real Estate", "Plants", "Mains", "Services" and "Meters and Miscellaneous", *on the basis of cost of reproduction*, are as found by the Court and stated in the Decree.

Affirmative Contention of Appellee.

It is the contention of Appellee that not only are the Assignments in relation to the findings of the Court, as incorporated in the Decree, unsustainable, *but that such findings as to the value of Property, Net Income and Return earned are much less favorable to Appellee, than the established facts upon approved legal principles justify.*

It will be submitted that, in important particulars, *the Master and not the Court reached the true conclusion;* and that, accordingly, the return in reality earned by Appellee, under the legislative Acts in question *is much less than the 5 per cent. computed by the Court.*

B.

CONCLUSIONS OF THE COURT AND MASTER.

Both the Court and Master held that the "present value" of the property employed in production and distribution of the volume of gas sold by Appellee was the true criterion, and on the subject of such value, the Net Income of Appellee from its gas business, and the Rate of Return earned and required, they found respectively as follows (*Record*, pp. 247, 432):

	Court.	Master.	Difference.
Real Estate	$11,985,435.	13,461,000	1,475,565
Plants	15,500,000	15,500,000	
Mains	12,636,000	12,636,000	
Services	1,994,000	1,994,000	
Meters & Miscellaneous	4,100,000	4,100,000	
Working Capital	1,616,000	3,616,000	2,000,000
National Coke & Coal Co.	----------	50,000	50,000
Astoria, *i. e.* Capital employed in production of gas secured from other Companies	----------	12,000,000	12,000,000
Special Franchises	12,000,000	----------	8,000,000
Special Franchises & Good Will	----------	20,000,000	
Total	$59,831,435.	$83,357,000	$23,525,565
Net Income	$3,024,592.	$2,327,328.	$697,264.
Return earned	5%	2.8%	2.2%
Return legally required	*At least 6%*	*At least 6%*	

Important To Be Noted.

The Court does not, in reality reject the "Astoria" item, $12,000,000, using that term generally to represent the value of "property of other Companies" employed in producing the gas acquired by Appellee from them; but instead of including the same with the assets of Appellee, the Court has preferred to include a return

thereon in the cost of such gas, as will hereinafter appear. The ultimate effect, in computing the proper charge per thousand for the volume of gas distributed by Appellee to cover cost and return on capital, is identical by either method.

Thus the value of investment upon which the Court holds that *a return must in some form be computed*, is in reality $71,831,435 instead of $59,831,435; and the actual difference between the Court and the Master is reduced from $23,525,565 to $11,525,565,—of which $8,000,000 represents the exclusion by the Court of Good Will, which was included by the Master.

C.

SYNOPSIS OF BRIEF.

The chief elements considered, in passing upon the validity of the Statutes in question, were :

(a) The Value of the Assets employed in the production and distribution of the gas sold by Appellee, including the assets of subsidiary Companies producing a large portion of such gas ;

(b) The normal cost to Appellee of the gas so sold by it, and the resulting "Net Income."

(c) Whether such "Net Income" produced a reasonable return upon the value of the assets, so employed in the production and distribution of said gas ;

(d) The possibility of maintaining the pressure at every point and at all times in Appellee's mains, within the limit prescribed by the Statutes, and especially in view of the lowering of the charge for gas to 80 cents.

For the convenience of the Court, we have inserted a comparative statement, in tabular form (*ante*, p. 6) of the

"Conclusions of the Court and Master"

on the subjects of "Value of Assets," "Net Income" of Appellee, and "Rate of Return" earned and required.

In discussing the questions at issue, it has seemed preferable—to promote simplicity—to number "Points" in this Brief consecutively; but the Brief will be divided into the following parts, the paging therein referring to the pages of this Brief* :

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*NOTE.—See "Table of Contents" for *full sub-headings* under Points. Only the most important sub-headings are given in this synopsis.

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PART FIRST.

Valuation of Assets of Appellee, Employed in the Production and Distribution of Gas, and allowed by the Court at $59,831,435 (*ante*, p. 6).

POINT I.

"Original Cost" not Controlling or Fully Ascertainable.

Appellants have assigned error in that the Court was not governed by the "original cost to the Complainant and its predecessor Companies" of such items as "Real Estate," "Mains" and "Services", rather than by their "present value." It is submitted that no error was committed.

1. Such "Cost" Not True Criterion.

The "original cost" of property now devoted to the public use is, as argued by Appellee in another Brief, not the true criterion.

As was said by Mr. Justice BREWER in *National Water Works Co. vs. Kansas City* (62 Fed., 853, 865):

> "The original cost of the construction cannot control, for 'original cost' and 'present value' are not equivalent terms."

It is submitted that there is no inherent right in certain individuals, because they happen to be consumers of gas, to the use of a parcel of real estate (for example), at less than the fair value at which it might now be sold or leased to other members of the community.

2. Such "Cost" Too Remote.

The "original cost" of the property to the six constituent Companies in the present case, is too remote to be of advantage in fixing "present value".

The first of the six Companies was incorporated in 1823, the second in 1830, and the other four at different dates from that time down (*Record*, pp. 152, 4826-4867). On this subject the Court said (*Record*, pp. 398-9):

> "I do not find that the original cost (where ascertainable) of Complainant's tangible property affords any assistance. The time of acquisition is too long ago, and conditions have so wholly changed, as to render comparisons useless."

3. Entire "Cost" Not Ascertainable.

If a finding of "original cost" were desirable, it is impossible; for it clearly appeared that no data existed from which it may be accurately computed, *so far as relates to the property acquired by Appellee, from the six constituent Companies in 1884* (*Record*, pp. 269, 270).

The only information available on this subject was the record of the New York Senate Committee of 1886 (*Senate Document 47 of 1886*) as presented before the Master (*Record*, p. 5325), and the books of *five* of the six constituent Companies—the books of the Knickerbocker Company, which had been leased years before to the Municipal Company, not being then or now discoverable (*Record*, pp. 3184, 5870).

Special Findings by Master

The Appellants offered from said Document a certain table made by accountant Yalden of said Committee, totaling $20,942,632.85, which sum the Master was requested to find to have been the "cost to the constituent Companies" of the *tangible* property taken over

from them by Appellee in 1884 at $29,994,000; but the Master declined, saying—

> "The evidence clearly shows that the actual cost to them, of property of the constituent Companies was in excess of the $20,942,632.85 shown in their books" *(Record*, p. 256).

And thereupon refers to a preceding portion of his Report *(Record*, p. 178) where he said:

> "It clearly appears that the term "cost of property" as used by the expert accountant, whose tabulations form part of the Report of the Senate Committee of 1886, did not represent the actual cost, but the amount at which the properties were carried on the books of the constituent Companies, *so far as they were before him.* In many instances the figures thus appearing on the books were reached after charging down as depreciation very large sums which represented the actual cost. Such charging down was in addition to and exclusive of expenditures for current repairs and renewals necessary to keep the plants of the Companies in efficient condition."

The Master likewise, for conclusive reasons stated by him, declined to find that the "original cost" to Appellee and the six constituent Companies, of Appellee's "real estate," was $4,118,-267.38, as requested by Appellants *(Record*, pp. 167, 268).

4. Evidence of Cost to "Predecessor Companies."

In support of these findings of the Master, which have been approved by the Court *(Record*, p. 430), it is pointed out that—

(a) The books of the Knickerbocker Company were not before Mr. Yalden at all, and the sum of $810,000, specified for the Knickerbocker in his schedule, merely represented the amount expended by the Municipal Company on the Knickerbocker system after the former had leased the latter *(Record*, pp. 4478, 4479). In fact, Mr. Yalden testified *(Record*, pp. 6410, 6204) that while this sum was spent by the Municipal on the Knickerbocker property—

> "*The works, the value of which is not brought into the books*, were appraised to the Consolidated at $3,000,000—

the works, of course, including the buildings, machinery and land, which are the most expensive part of a gas property, and which were so extensive that for years after the consolidation of 1884 they supplied the entire upper part of the City of New York (*Record*, p. 4580).

And at a later page, Mr. Yalden repeated that the $810,000 "is not really the cost of the property", and that, in addition to that amount and its Capital Stock, it was "subject to Mortgage Bonds of the Knickerbocker Company to the amount of $1,137,000" (*Complainant's Ex. 369, Record*, p. 6411), substantially all of which were outstanding and assumed by Appellee in 1884 (*Record*, p. 4480).

Indeed, the $20,942,000 in question excluded at least $2,400,000 of "cost" so far as the Knickerbocker property was concerned (*Record*, p. 4480).

(**b**) In addition to this, the New York Gas Light Company had arbitrarily written off $2,929,357.97, which it was necessary to write back at consolidation in 1884 to

> "reinstate the property at something like what it cost" (*Yalden, Complainant's Ex. 369, Record*, p. 6394);

(**c**) Likewise the Manhattan Company had charged off, in ten years, at least $2,030,000 on a plant which originally cost only $2,400,000, in addition to expenditures keeping the property "as good as new" (*Yalden, Record*, pp. 6315, 6338). The sum of $768,517.96 was charged off for "Mains", which left the "book value" of Mains over $600,000 less than at the beginning of the period (*Record*, p. 5633).

(**d**) And the Municipal Company had also written off $804,107.74,—it having been the practice of all the Companies in their prosperous days "to hide away some of the profits" by writing down the value of their property (*Yalden, Record*, pp. 4490, 6396).

Thus by correction in only the four items mentioned—and we do not know how many other like

items there may be—the $20,942,632.85, relied on by Appellants as "cost," was raised to over $29,000,000 (*Record*, p. 4490). Thus:

Figures at which property transferred to Appellee in 1884, was carried on books of constituent Companies (excluding those of Knickerbocker), as per Yalden		$20,942,632.85
Knickerbocker Company—Cost	$3,210,000	
On books of Municipal Company	810,000	
		2,400,000.00
N. Y. Gas Light Company—Amount property was written down below cost, and written back at Consolidation, as per Yalden's statement, to bring it back to "something like what it cost"		2,929,357.97
Manhattan Company—Amount likewise written off, although plant was "as good as new," as Yalden states		2,030,000.00
Municipal Company—Amount likewise written off but written back at Consolidation, as Yalden states, as in the case of the New York Company		804,107.74
Total		$29,106,098.56

But in addition to these, it appears that the Harlem Company had practically doubled its plant capacity, including the filling in of its water front and construction of its bulkheads,—all at a charge to operating "expense", without appearance in the property account at all (*Record*, pp. 4490, 6302-6304, 6308); while the New York Company carried nothing in property account for "Services, Meters, Gas Stoves and Furniture and Fixtures" (*Record*, pp. 5659, 5660), the cost of all which it had obviously charged to "operating expense".

(e) It is undoubtedly true that "original cost" of real estate to the constituent Companies was less than the value at which it was appraised and taken by Appellee in 1884, and less than its value today,—although just what such cost was, is not known, in the absence of the Knickerbocker books; but on the other hand, it is undoubted,—as indicated by the evidence and found by the Master (*Record*, pp. 269, 270, 4480, 4481, 4482)—that the plant stood *even on the books* of the constituent Companies at an amount greater than

their appraised value in 1884, in spite of the arbitrary and enormous "charging down" to "hide away profits" as above pointed out.

And doubtless the same is true of Mains and Services, since they were appraised in 1884 on the basis of the then value of $25 per ton for pipe (*Record*, p. 691), whereas pipe actually cost during the period in which a large part of the systems were laid, cost as high as $76 a ton (*Marks, Record*, p. 2046; *Edgerton, Record*, p. 2991).

Findings of the Master.

While, therefore, it is the finding of the Master that:

> "It is not possible from the evidence to state the *total* cost to the constituent Companies of their plants, mains or similar tangible assets" (*Record*, p. 270)—

and while such total cost could not be ascertained in the absence of the Knickerbocker books,—and even with those books could not be ascertained without going over the entire construction and expenditure vouchers (if in existence) of the Companies, back to 1823, to see what other "capital expenditures," in addition to those above enumerated, had been charged to "operating expense,"—sufficient appeared so that the Master was able additionally to find that:

> "As regards Mains and Services, therefore, as well as Real Estate, Plants and other tangible property, *it does not appear that any sufficient ground exists for the suggestion that the appraised value of 1884 was materially, if at all, in excess of the aggregate cost* of the tangible property to the constituent Companies" (*Record*, p. 252)—

and such "appraised value" was $29,994,000 (*ante*, p. 2).

Indeed, Vice-President Carter, who has been connected with Appellee since its creation (*Record* p. 767), after a careful investigation emphatically asserted that the "original cost" of the tangible properties of the six Companies *was undoubtedly and very largely in excess of the $29,994,000 at which it was appraised and taken by Appellee, in 1884* (*Record*, p. 4487).

Amount Contributed "by Stockholders."

The Public Service Commission suggests (*Brief*, pp. 24–5) that the "Capital invested" by stockholders of the "original companies" was only $14,564,571.82,—$4,275,000 of which represented "earnings" which went into the plant and were capitalized by the issue of stock. For all that appears, Stock of constituent Companies—in view of the high dividends being paid—may have been issued at substantial premiums.

But in our view, it makes no legal difference from what source the funds producing the property were received,—whether from stockholders for Stock, or borrowed on notes or bonds from stockholders or outsiders, or paid from earnings which belonged to stockholders and might have been paid to them in dividends and thereupon returned to the property for further issues of Stock, or *whether the property was a gift* to the Companies. It is undoubtedly true that, earning heavy dividends from a useful business, many of the Companies did enlarge their property very heavily from earnings, without going through the form of paying dividends to stockholders and then receiving the money back for investment.

5. Total "Original Cost" So Far as Computable.

The expenditures of Appellee, on capital account, in extension of its system since 1884 ,are accurate and available ; and this is as far as it is possible to secure exact *data* on the subject of "original cost" of production of the property which it now owns. But we can rely on *at least* the following "cost" :

Cost of *tangible* property to "constituent Companies" *at least (ante*, p. 18)	$29,994,000.00
Added by Appellee to November 11, 1884 *(Record*, p. 5018)	193,419.01
Added by Appellee since November 11, 1884 *(Original Record*, p. 7303)	9,693,565.90
Working Capital, at amount allowed by Court *(Ante*, p. 6)	1,616,000.00
Total *known* cost of production	$41,499,984.91

And this is exclusive of " Franchises " and " Good Will," and assumes for " Working Capital " 2,000,000 less than allowed by the Master and claimed here by Appellee *(post*, p. 77).

6. Appellants' Fallacious Estimates.

A.

Appellant The City of New York endeavors to find " original cost " by deducting from the Court's total valuation of property, $59,831,045 (*ante*, p. 6), what counsel considers " appreciation " in the items of Real Estate, Mains and Services which enter into said total, above the " *cost* " of said items respectively; and obtains $35,238,106.

Without consideration of minor errors, it is sufficient to say that said method is fundamentally wrong and incapable of reaching a just result.

(a) In the first place, counsel takes as the " original cost " of installation, Appellee's " book value " of mains ($7,852,000) and services ($1,212,000); but these valuations were, as above pointed out, based in large part on the *low price of pipe and inexpensive pavement in 1884*, and undoubtedly much less than the original cost of installation of said mains, when pipe ran as high as $76 per ton (*ante*, p. 18).

(b) Counsel also, while making such unsound assumption as to difference between cost of installation and present value of Mains, Services and Real Estate, makes no note of other items entering into said total of $59,831,045, whose " present value " is certainly *less* than the original cost of construction.

Thus, it has appeared, that the valuation at which the plants of the six constituent Companies were taken over by Appellee in 1884, was less than the figure at which they were carried on the books of said Companies, *even after said Companies had charged them down millions of dollars* to conceal profits, as previously indicated (*ante*, p. 16).

The same conditions which made iron pipe for mains expensive, likewise made all other iron and steel construction, machinery and apparatus expensive at the same time.

B.

Appellants, the Public Service Commission, give an estimate of "original cost" at $33,779,472 (*Brief*, p. 239), Pursuing the same method as the City, they reach an equally inaccurate result; indeed, a result somewhat wider of the mark.

What counsel for the Public Service Commission has in mind in suggesting that "Complainant made no attempt to supply the information as to original cost," we cannot conceive; for Appellee expressly consented to the examination by Appellants' Accountants of Books and Records of the original Companies, back to the formation of the New York Gas Light Company in 1823, and they availed themselves of the opportunity (*post*, p. 97).

Counsel excludes a parcel of land included by Marwick, Mitchell & Company covered by "New Shop, 66th Street" on the ground that no such item appears in the testimony, and that the "Shop" has probably been torn down (*Brief*, p. 41). He is in error. Mr. Mayer inadvertently omitted in his valuation two buildings and contents (*Record*, p. 1422), and this "New Shop" was one of them (*Record*, p. 4604).

C.

It is not at all apparent that, if total original expenditure in constructing Appellee's system as now in use were available, it might not equal or even exceed the "present value" found by the Court for Appellee's tangible property taken as a whole, $47,831,435 (*ante*, p. 6; *Record*, p. 423).

POINT II.

"Book Value" or "Cost to Appellee."

Appellants have also assigned error in that the Court was not governed by the "book value" of Appellee's property.

Such "book value" merely represents the *cost to Appellee* of such property; that is to say, the cost to it of the property acquired in 1884 from the six constituent Companies (*Record*, p. 153), plus its capital additions since that time (*Record*, p. 254).

It is not clear on what theory Appellants assert that such "book value" is to be conclusively taken as present value—for it is well understood that "book values" frequently and inevitably differ—sometimes very largely—from actual values. In the matter of "Real Estate," for example, it would be strange if present values did not exceed the "cost to Appellee" in 1884, since real estate values have largely increased in recent years in the City of New York, even 25 to 30 per cent. in some parts *within the past five or six years*, as all witnesses concede (*Record*, pp. 1177, 1180, 1288, 2183, 2253, 3132, 3137).

1. Erroneous Computation of Appellee's "Gas Capitalization."

The Public Service Commission computes what it denominates Appellee's present "Nominal Gas Capitalization," to be $43,007,372.82 (*Brief*, p. 22–3). It reaches this sum by taking the aggregate of Appellee's "present Stock, par value," "premiums on Bonds and Stocks" and "Debenture Bonds of 1888" (less Bonds paid off), to wit $93,412,736.71; and deducting therefrom what Counsel computes to be the amount of capital invested in securities of other Companies (exclusive of the Astoria Company), to wit: $50,405,364,89 (*Brief*, pp. 22–3); and as a second step, deduces Appellee's "New capital since 1884," to be only $3,929,271.82.

The whole process is fundamentally unsound. Appellee's actual "gas capitalization" is as follows:

"Capital" cost of tangible property and franchises acquired in 1884 (*ante*, p. 3)	$37,775,000
Other property acquired to November 11, 1884 (*ante*, p. 19)	196,419.01
Acquisition of permanent plant since consolidation, (*ante*, p. 19)	9,693,565.90
Total *permanent* plant (*Record*, p. 5032)	$47,664,984.91
Working Capital allowed by Court (*ante*, p. 6)	1,616.000.00
Total "Gas Capitalization"	$49,280,984.91

This is the true amount in place of the $43,007,371.82 assumed by Counsel, and shows "New Capital since 1884" far beyond the $3,929,371.82 asserted by him.

The fallacy of Counsel's computation arises from his assumption that "*capitalization*" can be represented by nothing but *Stock, Bonds and the premiums thereon*. It may be represented in many forms. Thus Appellee is employing in its gas business nearly One Million Dollars of capital representing "consumer's deposits" upon which it pays 6 per cent. interest (*Record*, pp. 809–10); and this interest was excluded in operating expense (*Record*, pp. 222, 248), for the very reason that the principal was so used by Appellee. So, too, its "surplus" of $1,547,697.38 has gone into its gas business, as well as part of the proceeds of the $20,000,000 of "Astoria" Debentures of 1904—so called by Counsel. All this appears in the Record (*Complainant's Exhibit* 80, *Record*, p. 5033).

In this connection it may be noted that while the amount of Stock issued by the Appellee in 1884 was only $35,430,060 (*ante*, p. 3), its capital assets are now represented in part by "Stock" to a *par* value of $41,356,409.86 (*Complainant's Exhibit* 80, *Record* p. 5033),—an addition of $5,926,349.86 in Stock, $3,647,940 of which was sold at $192.40 per share *and realized $7,019,811.73*, to say nothing of the balance which was sold at *not less than $150 per share* (*Record*, pp. 849–50).

It will be noted, that the amount of "gas capitalization" on the previous page, $49,280,984.91, is the sum of the following items in Exhibit 80 (*Record*, p. 5033)—to wit: "Plant and Property, Manhattan" ($47,664,984.91), and Working Capital, composed of $1,000,000 cash, and $616,000 (round amount) of "Materials and Supplies."

It will also be observed from Exhibit 80, that *no part of such assets were derived from earnings*, other than the divisible Surplus Earnings which belonged to the Stockholders.

2. Master's Finding of "Cost to Complainant" of Property Employed in its Gas Business.

The Master, deducting from Real Estate and Plant held by Appellee in its Gas Capital, such portions as he conceived not to be at the moment legally "employed" in its gas business, made the following finding for the information of the Court:

> "the *actual cost to Complainant* of the *tangible property and Franchises* employed in its gas business (including the amount found by me to be the capital invested in production of gas for Complainant outside Complainant's Manhattan works) is at least $60,214,000"

—classified as thereupon indicated by the Master (*Record*, p. 254).

It will be observed that the "cost to Complainant" of some of these items is less, and of some is greater, than the amount fixed by the Court as "present value" thereof respectively, as employed by Appellee in its gas business.

Excluding the item "Astoria," or Capital invested in the production of gas by subsidiary Companies for Appellee, there still remains on the Master's estimate a valuation of $48,214,000 of gas capital at "*Cost to Appellee*,"—although the amount would be somewhat reduced in the items "Real Estate" and "Working Capital," if the Court's view be accepted in lieu of the Master's, which Appellee argues should not be the case (*post*, pp. 68, 77).

POINT III.

Valuation of Real Estate.

A schedule of Appellee's holdings appears in the Master's Report (*Record*, p. 159), totaling in value $14,161,000.

Appellants charge error in the valuation of the items of real estate allowed by the Court (*ante*, p. 6) at $11,985,435 (aside from any controlling effect of "original cost," "book value" and "tax valuation," elsewhere discussed), in that:

> *(a)* It is in excess of the true valuation thereof, land having been valued as "vacant lots," and not in conjunction with the buildings thereon and for the uses and purposes to which it was devoted.
>
> *(b)* It duplicates in part the valuation given by the Court to the plants, since it could not be realized until the plants are removed.
>
> *(c)* It is in excess of the amount required for Appellee's gas business, upon the basis of the cost of reproduction.
>
> *(d)* In estimating value, the Court adopted the valuation given in testimony for Appellee, whereas the valuations testified to by unimpeached expert witnesses for the Appellants were lower.

The term "Real Estate" as employed in the evidence and findings comprises:

> "Land and water rights, including only such appurtenances as offices, stables and the like, and excluding all buildings and structures which are a part of the manufacturing or distributing plant of the Company. The structures included being of slight value as compared with the value of the land, the term 'Real Estate' as thus used is practically synonymous with 'Land.'" (*Record*, p. 156).

1. Method of Valuation.

The suggestion that such "Real Estate" was in any proper sense valued as "vacant" land, is misleading.

(a) Certain plots employed for storage of coal and street department supplies, and for other purposes not requiring a roof against the weather, were "vacant" in that there were no buildings thereon (*Record*, pp. 534, 554, 1232, 1233). They were valued, of course, by all witnesses as "land only."

(b) Certain other plots were covered by buildings of ordinary character and common usefulness, such as offices, dwelling houses and stables. All witnesses for all parties, as to each of these plots, stated the market value of the land with the buildings thereon; and also a separate valuation for land and for buildings, which together, in each instance, exactly equalled such market value of the two combined.

Land Covered by Plant.

(c) This leaves to be considered only those plots covered by manufacturing and distributing stations.

These "plants" consist of apparatus and machinery, holders with their brick or steel tanks, pipe connections, and "buildings" (*post*, p. 35).

The "buildings" are of unusual and extraordinary design, wholly incidental to and designed for the support and protection of said apparatus and machinery, and include special elaborate and expensive "foundations" for such apparatus and machinery (*Record*, pp. 3770–3772). They are concededly useless and valueless, except in conjunction with such apparatus and machinery. They are an integral part of the "plants" as much as the "apparatus" itself, and were so valued and treated by *all witnesses for all parties.*

The *real estate* experts for all parties stated the market value of the land covered by these "plants"; but not one attempted to state the value of the apparatus and machinery, holders and tanks, pipe connections, and buildings aforesaid. No real estate dealer (and only a practical gas-plant constructor) was competent to do so.

Accordingly, *engineers and contractors experienced in such matters* were introduced by the Appellee and Appellants to testify as to the

present value, based on cost of reproduction (less depreciation observed) of the "plants"; and these men would have been as incompetent to testify to the value of the land in the City of New York upon which the "plants" rested, as were the real estate witnesses to testify to the cost of reproduction of the "plants" in operation upon such land.

The combination of the land values and plant values thus obtained would give the correct value of *the land in conjunction with the plants thereon*, as part of an operating concern; for if Appellee were in any way (as by condemnation) to lose them, it could not replace them for a less expenditure.

Certainly the special value of the land covered by "plant" (whether located on the Island of Manhattan or in a small town) is to be considered in fixing the total value of a gas property in use; and it is more than doubtful whether any one person could be found so versed in values of both New York City realty and gas machinery and construction, as to be able to state an aggregate value for Appellee's gas plants with the blocks of land covered thereby,—even if they would be of any value or sell for anything beyond the bare value of the *land alone*, except in conjunction with the Mains, Franchises and other assets constituting the operating system.

NOTE. It is suggested in the Brief of the Public Service Commission (p. 58) that Appellee's "theory of plottage," in valuation of the large parcels of real estate was disapproved in *Matter of the City of New York*, 56 Misc. (N. Y.) 306–310. This is a mistake. The Court in that case merely held that the Report of Commissioners would not be sent back, because they did not include a "plottage" value for the land in bulk, beyond its value if sold in individual lots; but the Court, however, pointed out that in that case the Commissioners *found no such additional value to exist*, while in the present case an added value for "plottage" was admitted and included, not only by Appellee's witnesses but *by both of Appellant's witnesses* as well (*Record*, pp. 1193, 3136, 2245, 2177).

2. Method of Valuation Approved.

In important and leading rate cases considered in this Court and in the New York Court of Appeals, witnesses have primarily testified to the value of land employed, as distinct from value of plant thereon, in reaching present or reproductive value.

Smyth v. Ames, 169 U.S., 466 :
Trustees of Saratoga Springs v. Saratoga Gas Company, 191 N. Y. 123 :

In *Smyth v. Ames* (Union Pacific Company) the Complainant's witness gave separately exact statements of value of land occupied by Omaha terminals, the value of buildings thereon, and value of the track, ballasting, bridges, etc. forming part of the terminals. He then gave a general estimate of the value altogether, which was considerably in excess of the three items *(Record of that case, pp. 1379–82).*

The expert of the defendants, the Nebraska Board of Transportation, gave separately the cost of reproduction of the track and sidings, the land, the general buildings, the shop buildings including machinery and furniture, the expense of engineering and contingencies; and gave the exact total of these individual valuations as "the cost of reproducing" the terminal properties *(Record of that case, pp. 1642–3).*

In reference to the *Chicago, Burlington & Quincy Company* and the *Chicago and Northwestern Company,* Complainants also gave separately the valuation of lands and buildings; and the total valuations were merely the sum of these individual valuations *(Record of that case, pp. 1266–7, 1563–4, 1573–8).*

In *Trustees of Saratoga Springs* v. *Saratoga Gas Company,* in which an important section of the New York Gas Commission Act was recently declared unconstitutional, the land, the buildings thereon belonging to the "plant", and

the machinery and apparatus constituting the balance of the "plant", were each valued *separately and by separate witnesses* on behalf of the defendant Company; and the same is true of the witnesses for the plaintiffs, except that (as in the case at bar) the same witnesses testified to the value of the buildings with apparatus and machinery, constituting the plant *(Record of that case, fols. 220-41, 495-505, 760-778, 790-833, 858-863, 1207-1220)*.

We do not observe that the manner or value of such proof has been heretofore questioned. Indeed, by no other method than that pursued can the reproductive cost, which is presented as the true test of value in such a case as the present, be reached. As the Master well said *(Record*, p. 176):

> "While the real estate has a substantial value irrespective of the purposes for which it is now held, *the plants, mains, etc.* are of value only when used by a going concern. For any other purpose they are merely scrap, or second-hand machinery, and their intrinsic worth is inappreciable. As to their *market* value, there is no means of judging."

3. Less than Reproduction Value of Land.

The value of "real estate" as computed and found in this case, is, in reality, considerably less than the cost of reproduction, and therefore less favorable to Appellee than should have been.

All the real estate witnesses valued the land at its depreciated selling price, due to the presence of the gas plants. They all conceded that, if the plants were to be removed, their estimates of market value of land covered would be increased from 10 to 25 per cent. *(Record*, pp. 1180, 1296, 1298, 2250, 3156),—that is to say, if the land were really "*vacant*".

To reach the actual "reproduction" value of the land, it would be necessary to estimate the cost of acquirement of equivalent land, similarly situated, by a new Company, under ordinary circumstances

and it was undisputed that such land could not thus be procured for "anything like" the valuation placed upon the land under present conditions (*Record*, pp. 1180, 1193).

It is, accordingly, Appellee's contention that the valuation of "real estate", as returned by the Master and Court, is by several million dollars too low.

4. Valuation not Duplication of Plant Value.

It is not perceived how the valuation of the land as made, duplicates the valuation given by the Court to the plants.

It is not true that the valuation of the land could not be realized until the plants thereon were removed; for the property, both land and plants together, might be acquired by another Company desiring to continue the same business,—in the same manner as Appellee, in 1884, acquired the plants and property of six then existing companies at a value based on the *cost of their reproduction at that time*, to wit: the market value of the *land* as then appraised, plus the cost of reproducing the *plants* thereon, as separately estimated. (*Record*, pp. 4925, 4939, 4941, 4942, 4955).

Nor do we understand, and much less accept, the theory that value may not exist independent of a sale consummated, or that a piece of real estate or other property purchased years ago cannot now be considered as worth more than cost, if and while unsold, although its market "value" may now be twice such cost.

Would such a proposition be entertained in a proceeding to take the property for a public use under the power of eminent domain? Would not a gas Company in such case be entitled to an award sufficient to represent the market value of the land, plus an amount sufficient to reproduce thereon a plant of the character and capacity taken? Would anything less be "just compensation," or make the Company whole? Would the State be heard to say that such an award was a "duplication" of value, or that no value beyond "original cost" (and the land may have been donated *gratis*) could be allowed, because the increment of value had not been realized by

a sale, or that the Company must be limited to what the land and plant together would bring at a forced sale to a purchaser designing the plot for *ordinary* improvement, for which the "plant" would be unfitted and worthless? And would not such a proposition, if put in practice, amount to confiscation of a large part of the investment of the Company?

As said by Mr. Justice BREWER in *Ames v. Union Pacific Railway Company* (64 Fed., 165, 176; affirmed in *Smyth v. Ames*, 169 U. S. 466), after declaring the safeguards of the Constitution in the appropriation of private property by "condemnation proceedings":

> "The same general ideas must enter into and control legislation of the kind before us."

5. Real Estate Not in Excess of Requirements.

The valuation of the Court covers only land "actually in use" by Appellee "in its gas business"; all other land was excluded (*Record*, pp. 393, 423, 430).

There is nothing which can be called evidence, much less any finding, that this is "in excess of the amount required by Complainant in its gas business, upon the basis of the cost of reproduction".

On the contrary, it was affirmatively proven that there was such an overcrowding of apparatus at some stations (21st Street, for instance), that a greater area would be properly required if a plant of like capacity were now to be constructed (*Record*, pp. 290, 1507); while additional holders in the distribution system are being constantly required, with growth of sales (*Record*, p. 587).

The Court considered, and expressly declined to find as a fact, the proposition here advanced by Appellants (*Record*, p. 423).

Appellant, The City of New York, presented to the Master a request for a finding based on a theory as to the amount of land required for a large water-gas plant, deduced from the land used per unit of production at the crowded 21st Street plant (*Record*, pp. 288, 289); but it will be observed that this land is simply

that covered by *buildings* and nothing more. The computation assumed that a gas plant could be built with no space for general connections; no space between buildings, either for the purpose of gangways, or to afford such prudent segregation as to prevent the entire plant from being destroyed if one building should get on fire; no space for contiguous yards for loading and unloading supplies, making repairs or providing shops, or for storage of coal or coke which must be immediately at hand; no space for tar tanks, ammonia tanks or oil tanks, none of which can be located under the buildings.

And furthermore the request made no allowance for a *pro rata* of lands used for general holder purposes, and not located immediately at the 21st Street station, but employed and necessary for handling the output of that plant with other works (*Record*, p. 290).

6. Acceptance of Valuations of Appellee's Witnesses.

Nor is it believed to be good ground of objection that the Master and Court accepted the valuations of Appellee's witnesses, rather than the estimates of Appellants' experts which "were lower."

It is suggested that the Appellants' witnesses were "unimpeached". If it is meant that their character for veracity was not attacked, it is true; but if the term relates to their demonstrated knowledge, competency and reliability in their estimates, they were thoroughly "impeached."

Referring to the exhibition of Appellants' witnesses on the stand, the Master said (*Record*, p. 158):

> "Their cross-examination disclosed numerous instances in which they disclaimed knowledge of actual sales in the immediate vicinity of the parcel under consideration, notwithstanding such sales were matters of public record.
>
> "In a dozen or more instances, their valuations approximated or were substantially below the assessed valuation of the land. It is, of course, true that the assessed valuation of real property is often equal to or higher than its actual value, but it is generally understood and *was in fact admitted on the record* that as a rule, tax values are substantially lower

than the prices that can be realized for property sold under ordinary conditions. When, therefore, in so many instances defendants' witnesses made their valuations approximate closely the assessed valuations, some question is suggested as to the weight to be given to their judgment.

"Mr. Wells * * * like the other witnesses called by defendants, * * * was not familiar in many instances with recent sales of property in the immediate neighborhood of the parcel under consideration. *Taken as a whole, the testimony of these defendants does not show that they gave to their appraisals the amount of care and study that characterizes the work of Complainant's witnesses.* For example, one witness in valuing the property occupied by the Company at 42nd Street and 44th Street, excluded that portion of it comprised within the lines of 12th Avenue, on the ground that the Company had no title thereto. He failed, however, to make any allowance for the fact that on this theory certain of the lots remaining would have an enhanced value as corner lots, which, according to well known rules, make them worth often 50 or 60 per cent. more than interior lots in the same block. In another instance no allowance was made for the circumstance that the parcel in question had a frontage both on an avenue and a side street. * * *

"In repeated instances, defendants' witnesses were unable to specify any transactions in the neighborhood at unit figures so low as those given in their valuations, *whereas Complainant's in the great majority of cases were able to substantiate, or at least to some extent support their estimates by reference to actual transactions.*"

(a) Appellants' Explanations.

Counsel for the Public Service Commission endeavors (*Brief*, pp. 47-58) to minimize the want of knowledge and of reliability exhibited by Appellants' witnesses, as compared with Appellee's, pointing out what he claims to be explanations of the fact that they were not posted as to well known sales in the section under appraisal. A re-reading of the Master's report will indicate whether the attempt has been successful. How does one account for the failure of a witness to value a corner lot at an increase over the interior lot, after he has established it as a corner lot by his own theory? Moreover, since Counsel, who was not present at the trial, goes without the record to state what he conceives to have been the prac-

tice as to bringing to the hearing slips recording contiguous and contemporaneous sales, it may be proper for Counsel, who was present throughout, to say in reply that (with the exception of few parcels) witnesses for Appellants did have present with them all the *data* which they claimed to possess respecting such sales; their ignorance of recent sales, recorded in what were conceded to be the recognized real estate guides, and with which Appellee's witnesses were entirely familiar from those records, could hardly have been more complete, as the testimony shows.

We suppose there can be no better evidence of the value of parcels of real estate, than actual recent transactions therein,—the very *data* with which it would seem that Appellants' witnesses, if competent and painstaking, would have taken measures to acquaint themselves; and it appeared that such transactions—with which Appellants' witnesses were rarely familiar—almost invariably confirmed the valuation of Appellee's witnesses, and condemned those of Appellants' as insufficient.

Moreover, Messrs. Thompson and McHale *gave identically the same valuation for virtually every parcel*,—a most unusual circumstance where witnesses were supposed to be exercising an independent judgment.

And finally, their evidence showed a present valuation of only 11 to 13% over the valuation of 1884,—an incredible figure in view of the heavy increase in the values of real estate in the City of New York within the last twenty-five years, often amounting to from twenty-five to thirty-five per cent. even within the past five or six years. (*Record*, pp. 1177, 1288, 2183, 3132, 3137).

(b) Conclusion.

If Appellants' Assignments intend to suggest that, in a rate case, the Court is bound to accept the valuations of a defendant's witnesses if they be honest, no matter how incompetent or uninformed they may be demonstrated to be, we are content to leave the proposition with the Court without argument.

POINT IV.

Valuation of Plants.

The term "plant" as employed in the evidence and findings includes (*Record*, p. 169):

> "*(a)* Buildings and foundations of apparatus, forming part of the manufacturing and distributing stations;
> *(b)* Apparatus;
> *(c)* Holders; and
> *(d)* General connections at the stations."

The valuation of Engineer Mayer is summarized by the Master as follows (*Record*, p. 175):

21st	Street	Plant	including	all	Holders	---- $4,162,021	
44th	"	"	"	"	"	---- 2,000,205	
99th	"	"	"	"	"	---- 963,011	
14th	"	"	"	"	"	---- 2,549,545	
42d	"	"	"	"	"	---- 1,744,660	
18th	"	"	"	"	"	---- 588,873	
	Totals for all plants ----------						$12,008,315
63rd	Street	Holder	Station	Complete		---- $490,072	
65th	"	"	"	"		---- 1,427,317	
111th	"	"	"	"		---- 1,039,910	
132nd	"	"	"	"		---- 540,702	
Inwood	"	"	"	"		---- 26,173	
	Total for all Holder Stations----------						3,524,174
	Total for Plants and Holders now in use--						$15,532,489

Appellants charge error in the valuation of this item by the Court (*ante*, p. 6)-at $15,500,000 (aside from any controlling effect of "original cost", "book value" and "tax valuation", elsewhere discussed), in that it assumes the reproduction,—

(a) Of Appellee's "identical plant and each part thereof"

(b) "Without regard to whether the same was originally, economically produced," "or economically and commercially

worth producing," " or as to the obsolescence of type and the advancement of the art ; "

(c) And not " of a plant that would produce the same kind, quantity and quality of gas in an economically constructed, modern plant."

1. Not of "Identical Plant and Each Part."

The sum of $15,500,000 found by the Master and Court as the value of the plants *(ante,* p. 6), does not represent the value of the " identical plant and each part thereof," but is a less sum.

The Master took the valuation of the witness Mayer as a general guide *(Record,* p. 171); but Mr. Mayer's total valuation was $16,137,477, and deducting depreciation to the amount of over $604,988, for which sum the plants could be made in all respects as good as new *(Record,* p. 174), his net was $15,532,489. This sum was further reduced by the Master to $15,500,000 " to allow for possible over-valuation in some details " *(Record,* p. 175); and besides, Mr. Mayer had inadvertently omitted two entire buildings with their contents, in his estimate *(Record,* pp. 4604–5).

The Court finds that the valuation of the Master was based " upon competent and persuasive evidence " *(Record,* p. 391).

(a) A Much Higher Valuation Sustainable.

Indeed, there was ample evidence to sustain a much higher valuation. The estimates of Chief Engineer Bradley, of Vice-President Addicks and of Dr. Alexander C. Humphreys, President of the Stevens Institute of Technology, who has been " continuously engaged in the gas business for 35 years, both as a Consulting Engineer and in construction, * * * concededly a leading authority on the subject " *(Record,* pp. 170, 2575),—all men of the highest competency and thoroughly familiar with the plants,—ran substantially above Mr. Mayer's, Mr. Bradley's being $16,812,915, or more than $1,300,000 higher than the finding of the Master *(Record,* p. 169).

(c) Insignificant value of items criticised.

Indeed, all the items of plant (and they are few and not relatively important) specifically criticised below by Appellants,—chiefly (*a*) certain *generating* apparatus at Complainant's 111th Street holder station, practically new and now properly held as a reserve apparatus *(Matter of Mayor, 39 Appellate Division Reports, N. Y., 589, 592), and only valued at $140,853, according to Appellants' Brief below;* (*b*) housing for holders at 18th Street, which was approved construction when erected and which now reduces operating expense by eliminating painting and repairs required on exposed holders, while adding on the other hand to investment; and (*c*) a few "benches" at water-gas plants, which the defendants erroneously and without proof assumed to be abandoned "coal-gas benches", instead of water-gas benches, as they are;—*might be excluded from the computation and a valuation much higher than $15,500,000 for the balance be still sustained upon ample evidence.*

Appellants' contentions as to those items were, moreover, thoroughly presented below and overruled by the Court and Master *(Record,* p. 258, 423).

2. No Evidence that Plants were not "Economically Produced."

There is no evidence that the plants, or any part of them, were not "originally economically produced." On the contrary, the testimony so far as it touches that point, is directly the reverse, and thereon the Master made the following finding:

> "There is no satisfactory evidence that the cost to Complainant of said property was unreasonable or excessive; or that the cost of production of said property was enhanced through faulty construction or waste; or that the various sums expended from time to time by Complainant or its predecessor Companies in permanent improvements and betterments were not intelligently and properly expended; or that any such expenditure was made otherwise than providently and honestly." *(Record,* p. 254).

Moreover, as the present value of the property as it is being devoted to the public service, is conceived to be the proper factor, the question of economy in original production does not seem important.

3. No Evidence that Plants are Not Worth Reproducing.

Nor does the evidence show that the existing plants are not "commercially and economically worth reproducing". On the contrary, again the evidence shows, and the Master has found *at the request of the Attorney General and other Appellants,*—

> "That several of the coal-gas plants which were transferred to Complainant by its constituent Companies in 1884, have been replaced with water and oil gas plants of the *latest and most improved methods;* that the maximum daily capacity of the water and oil plants of the Complainant is 41,500,000 cubic feet, out of a total capacity of the Complainant's plants in operation, amounting to 51,000,000, which does not include the 18th Street plant; that *all of the manufacturing plants of the Complainant are in good and efficient condition and that four-fifths of the present generating capacity thereof are in the shape of modern-up-to-date water gas plants which could not be improved upon anywhere;* and that one-fifth of the generating capacity thereof, or the coal gas plants, while possessed of some apparatus which is not of the latest pattern, *are efficient and in shape to operate for an indefinite period without impairment;* that the plants of Complainant were in good condition, operating continuously and successfully when they were taken over by Complainant in 1884, and are in good condition now,—better than they were at that time,—and are producing about twice as much gas, at a lower rate." (*Record*, p. 276).

(a) Inconsistency of Appellants.

We present in this connection the following remarkable statement in the *Brief* of the Attorney General (p. 87):

> "The record tends to show that a large part of such plant is obsolete, is grossly inefficient from the standpoint of the

present state of the art, and that the cost of production thereby is greatly in excess of what it would be if the Company employed modern methods and appliances available for its use in the field of its operation."

The attitude of the Appellants respecting the quality of the plants, seems to vary with the angle at which they approach them. When opposing, and successfully, the allowance of a sum for "upkeep", in addition to average actual expenditures for twenty years, the plants are, in their view, of approved type, "efficient", "in good condition" and producing gas at a "lower rate than ever" as stated in the above finding; but when it comes to the valuation of the same plants to determine the amount of the investment upon which a return is to be computed, they are "inefficient", "obsolete" and altogether of no account.

(b) The Actual Situation.

The matter reduces itself to this:—that in Appellee's coal-gas plants, constituting less than one-fifth of its total capacity, there is "*some* apparatus which is not of the *latest* pattern," although "*efficient* and in shape to operate for an indefinite period without impairment;" that is to say, there is found (as would be the case in any plant long in operation) a set of benches or other apparatus smaller or different in type from that which might be installed as an original proposition if the plants were to be now constructed of their present great capacity.

Thus, Appellee (**a**) has some retorts in "benches of sixes," while "benches of nines" might now be installed in so large a plant if newly built, but "benches of sixes" are perfectly good construction and are now being installed in new plants (*Mayer, Record*, pp. 1513, 1514), and it would be economically indefensible to discard them, while operating efficiently, for "benches of nines" (*Humphreys, Record*, p. 1844; *Mayer, Record*, p. 1505); (**b**) there are also some ordinary furnaces, which have not been replaced by the new "regenerative" furnaces which require two stories and a more expensive "building" construction in operation (*Record*, p.

1738); and (c) finally, there is in use, at the Forty-second Street plant, "hand charging" apparatus for retorts, instead of the more expensive "charging machine", which requires a larger building and adds to the requirement of "return on capital" on the one hand while saving certain pay-roll labor on the other.

Practically every new device means additional capital investment; it is obvious that it would raise the cost of gas production to an extravagant figure, involving substantial charges to operating expense to make good the value lost, as well as additions to capital account to an amount equal to the excess value of the new apparatus over the old, if a Company were recklessly to scrap and charge off apparatus—no matter if still operating unimpaired—every time some improvement was designed; and whether in any particular case immediate substitution thereof is justifiable, is a matter which must be left to the discretion of the operating staff of a Company, with the presumption that they will exercise (and in Appellee's case have exercised) such discretion competently and wisely.

Of course, the valuation of the Court and of the Master *is of the existing apparatus*, and not of the more expensive "latest pattern" as to the items noted.

(c) Evidence of Efficiency From Cost of Gas Production.

The cost of production in Appellee's water gas plants, constituting over four-fifths of its capacity, is shown to be several cents less than the cost to the New York Mutual Gas Light Company which alone compares in age with Appellee (*Record*, pp. 4584-5); and to be substantially identical with the cost to the other and newest water-gas Companies operating in the City of New York,—and where there is any difference against Appellee, it is but slight and such as would naturally occur between Companies operating in the same district (*Record*, pp. 241, 3360), and is due to circumstances (such as the fact that Appellee's plants have been cut off from the water front by marginal streets) having no relation to efficiency in operation (*Record*, pp. 241, 647, 2406, 2413, 4436, 4437, 4472, 5287).

And while there is no other coal-gas, of 22 candle power or otherwise, produced on the Island of Manhattan with which to compare Appellee's, it is seen to be but a fraction of a cent beyond the cost of water gas to the Mutual Gas Light Company operating the same territory. Furthermore, as subsequently appears (*post*, p. 42) any small increase in cost of production is offset by lesser return required on the less expensive coal-gas apparatus employed.

The only Company in or about the City of New York, claimed by Appellants to be producing gas at less than Appellee and its subsidiary Companies above mentioned, was the Central Union Gas Company, which operates in the Bronx; and the reason of its apparent divergence is set forth by the Master and has no relation to operating efficiency (*Record*, p. 241). Among other things, it was not maintaining the candle power required by Appellee and other Manhattan Companies; and as soon as it was compelled to do so, the cost of its gas immediately rose "to substantially the same figures as the gas delivered by all other Companies" (*Record*, p. 241).

Counsel for the Public Service Commission quotes Mr. Bradley as saying of the 14th Street Coal Gas Works—"Nobody else would want to buy it for a gas manufacturing plant" (*Brief*, p. 66). The quotation might mislead. The context clearly shows that Mr. Bradley merely meant that, if the Manhattan plants were removed to Astoria, the sites would be sold to some outsider for "ordinary" improvement and not for use as "gas plants." *He did not refer to 14th Street alone.*

4. Assumed Reproduction of the Most "Modern" Plants of Same Individual Capacity.

Nor is there merit in the suggestion that the valuation of plant would have been more favorable to Appellants, if based on (*a*) the cost of "reproduction of a plant that would produce the same kind, quantity and quality of gas in an economically constructed modern plant" (*Record*, p. 482), (*b*) or, as the Public Service Commission

puts it, the "lesser *(sic)* cost of replacement with plants of more modern character, which would produce equal service" *(Record*, p. 438).

(a) So far as concerns Appellee's **water-gas capacity,** representing more than four-fifths of the total capacity, no question can be raised that it is not now in the shape "of modern, up-to-date water-gas plants which could not be improved upon anywhere" (*ante*, p. 38; *Record*, p. 276).

(b) As to Appellee's **coal-gas plants,** it will be observed that the valuation of Mr. Mayer is $327 for the 14th Street and $330 for the 42nd Street plant, per thousand feet of maximum daily capacity (*Record*, p. 1454), while the cost of a new coal-gas plant (such as "Astoria") equipped throughout with the latest type of machinery, will easily run to $400 or more per thousand *(Mayer, Record*, pp. 1456, 1721, 1724, 1727; *Master's Report, Record*, pp. 181-3); and the additional capitalization of $70 or more per thousand feet, would require an additional amount on each thousand feet of gas produced, to pay a reasonable return thereon,—to say nothing of the "replacement" charge which such gas must also carry to cover the value of the old plant scrapped, or the "depreciation" on the $70 additional plant value.

This is a circumstance which Appellants seem wholly to have overlooked.

5. Assumed Reproduction of Appellee's Present Capacity, in Larger Units.

The Assignments do not directly suggest, as a proper basis of valuation, the cost of the replacement of Appellee's three water-gas plants by a single larger water-gas plant, or its two coal-gas plants by a single larger coal-gas plant.

Such a proposition was, however, presented below and is now advanced in the Brief for the Attorney General.

It is submitted to be without merit.

(a) The Proposition Unsustainable in Law.

A Company which has been built up to meet the needs of a community as they have developed, with plants in many instances supplying distinct sections, should not be despoiled of its property, even if a single larger plant might now be produced at less cost per unit of capacity.

(b) Great Size of Appellee's Present Plants.

If, however, we examine the proposition on its merits, it is important not to overlook the immense size of each of Appellee's present plants. Their maximum day's capacity, and annual capacity based upon the recognized formula (*post*, p. 122), are as follows:

	Cu. Ft. Maximum Daily	Cu. Ft. Annual Capacity
21st Street	27,500,000	5,500,000,000
44th Street	8,500,000	1,700,000,000
99th Street	5,500,000	1,100,000,000
14th Street	5,000,000	1,000,000,000
42nd Street	4,500,000	900,000,000

It will be observed that the capacity of the 21st Street plant alone (probably the largest water gas plant in the United States with the exception of the New Amsterdam, which exceeds it but slightly) has an annual capacity equal to nearly twice the entire sales of the City of Boston in the year 1905 *(Daily capacity of 21st St. Plant, Record, p. 1326;— Boston yearly sales, Record, p. 212).*

And even the smallest, the 42nd Street plant, has a capacity equal to nearly one-third the requirements of the same city in that year.

(c) No Economy in Gas Production in Larger Plants.

Mr. Cowdrey, who was invited by the Committee of the Chicago Council upon the recent investigation in that City, to advise them as a practical gas engineer, there said :

> " I doubt if one could distinguish between the cost of operating a plant of 20,000,000 capacity and the operation of four plants of 5,000,000 capacity each " (*Record*, p. 2589).

And Appellants' witness, Professor Bemis, in substantiation of this view, which does not seem anywhere to be questioned, testified that when a plant had reached so large a capacity as 700,000,000 cubic feet per annum, there was little, if any, economy in production in a larger plant (*Record*, pp. 1509, 2417).

It will be observed (*ante*, p. 43) that Appellee's smallest plant has a capacity substantially in excess of the capacity stated by Professor Bemis.

(d) Cost of Larger Plant in Place of Present Plants.

In point of fact, it does not appear that a larger manufacturing plant (excluding holders, separately considered below), could be produced at less cost per unit of capacity than the present ones.

Water-Gas.

As to water-gas capacity, the Master has found, *upon the request of Appellants*, that the valuation, per thousand of capacity, placed upon Appellee's water-gas plants, in Mr. Mayer's valuation, which the Master generally followed, is " a fair unit to assume " as the value of a water-gas plant, *no matter what the capacity might be* " ; and, accordingly, that the cost of a collossal water-gas plant equal to Appellee's total water-gas capacity of 41,500,000 per day, would be $5,104,500 (*Record*, p. 264).

Indeed, Mr. Mayer's valuation of the three water-gas plants (at 21st, 44th and 99th Sts.) aggregated $5,112,000, exclusive of holders (*Record*, pp. 1326, 1329, 1331), as compared with the Attorney-General's figure of $5,104,500 (*Attorney-General's Brief, p. 92*), or substantially identical.

Coal-Gas.

But in his computation as to a single coal-gas plant (*Attorney General's Brief*, pp. 88-92) the Attorney General is completely in error.

(a) As to Appellee's existing coal-gas plants, Mr. Mayer's valuation was for the 14th and 42nd Street plants, $327 and $330 respectively per thousand feet of maximum daily capacity (*Record*, p. 1454); while for a plant of the combined capacity of the two, 9,500,000 feet per maximum day, he declined to make an offhand estimate, but declared that he did not believe "that any plant can be built *for less* than $300 per thousand" (*Record*, p. 1457). At even $300 per thousand feet this would mean an average difference in value between Appellee's existing plants and the proposed plants, of less than $30 per thousand feet, or of less than $285,000 in the aggregate.

But Chief Engineer Bradley testified that in his judgment a coal-gas plant would cost $400 per thousand feet of capacity (*Record*, pp. 1721, 1724, 1727), which in any aspect would give a valuation for a coal-gas plant of 9,500,000 feet maximum daily capacity, much beyond the aggregate valuation of Mr. Mayer even for the two existing plants.

(b) Realizing, perhaps, the insufficiency of his argument in this aspect, the Attorney General proposes to measure the cost of the 9,500,000 plant by the cost of the Astoria plant, with which method we are quite content; but for this purpose he suggests Chief Engineer Bradley as estimating, *on the basis of the unit cost at Astoria*, the cost of a plant of 10,000,000 feet capacity to be $2,441,015.81, or $244.10 per thousand feet of capacity,—upon which ratio

a plant of 9,500,000 feet would cost $2,318,950, as against Mr. Mayer's valuation of $3,124,241 for Appellee's Fourteenth Street and Forty-second Street coal gas plants together.

The evidence not only fails to sustain, but clearly contradicts, such assumption. The Master expressly refused to find that a plant of 10,000,000 cubic feet could be constructed at the aggregate or unit cost thus advanced by the Attorney General (*Record*, p. 264), calling attention to the fact that Mr. Bradley "expressly stated that the figures regarding the Astoria cost, which he then gave at counsel's request, were not complete or accurate." (*Master's Report*, p. 264–5).

Mr. Bradley had testified that a coal gas plant would cost $400 per thousand cubic feet (*Record*, pp. 1721, 1724, 1727); Mr. Mayer had testified that the Astoria plant would run up to $400 easily (*Record*, p. 1456); and the final cost of the Astoria plant had already been presented and, even exclusive of land and tunnel, was much beyond $400 per thousand cubic feet (*Master's Report*, *Record*, pp. 181–3).

The facts are that counsel for the Attorney General himself prepared a blank upon which were indicated various items of coal-gas apparatus (State's Ex. V, *Record*, p. 5278), and requested Mr. Bradley to state the cost of such apparatus at Astoria, which was done (*Record*, p. 1705). Thereupon, he asked Mr. Bradley to estimate, offhand, the cost of similar apparatus for a plant of one-half the Astoria capacity, or 10,000,000 cubic feet. The total thus reached was $3,360,021.93, but one has only to read the Record (pp. 1711–13) to note the worthlessness of this figure as an accurate statement of the cost, even of the apparatus which it covered,—Mr. Bradley repeatedly indicating that it was impossible without consideration to give an accurate estimate, and that the cost of the smaller capacity could not necessarily be *pro rated* from the larger.

Mr. Bradley also protested that the figures in State's Ex. V were only a part of the total Astoria cost (*Record*, p. 1711), that it lacked many items of apparatus constructed at Astoria (*Record*, pp. 1711, 1712, 1736–7); and subsequently (*Record*, p. 1741–2), he pre-

sented a schedule (Ex. 235, *Record*, p. 5289) showing a list of items omitted from State's Ex. V, aggregating (as the Master states) $4,327,930.67 (*Record*, p. 264).

The Attorney General now suggests (*his Brief*, p. 91) that only $111,000 out of Exhibit 235, is to be added to the items of Exhibit V; and adds that the Court will observe that, of the list given by Mr. Bradley (Ex. 235), "everything except the coal and coke handling plant would be *referable to real estate* and to the particular Astoria real estate, whereas what was sought was the value of the plant exclusive of real estate and holders." Nothing could be more erroneous.

The cost of production of a plant, includes any number of items which are "referable to real estate" in the sense that they ultimately become part of the real estate, even buildings and the foundations of apparatus; and in Exhibit 235 we find such items as "fences," "land drainage system," "engineering department," "temporary structures," "repairs," "handling cement," storeroom, sundry and general "expense," "insurance," "legal expense," "taxes," and doubtless many others, which analysis will show to be equally inevitable in the construction of a plant—to say nothing of interest on investment in plant during construction, which item, for Astoria, amounted at the time of the trial to upwards of $1,000,000 (*Record*, p. 1560), and many other items included in "grading, filling and the *necessary work on real estate to produce this plant*" (*Record*, p. 1712).

Moreover there are conditions on the Island of Manhattan, which make plant construction there in many respects more expensive per unit than at Astoria, such as the presence of marginal streets between the docks and the property to be improved, the necessity of heavy masonry walls about the gas plant instead of lighter fences, the general congestion of traffic and restrictions upon building in the midst of a great City, and the fact that the plants must be cut up by intersecting streets only 200 feet apart, which are certain to increase the expense of construction, *ceteris paribus*, beyond expense at Astoria.

It follows from the foregoing that the estimate in the Attorney General's Brief for coal-gas plant, $2,424,970 (p. 92), cannot possibly be accepted.

(e) Reproduction of Holders.

As to holders,—no fair valuation could be based except upon them as they exist. They have been constructed to meet the requirements of the growing business and vary in capacity from two hundred thousand cubic feet to five million cubic feet (*Record*, pp. 624, 1319, 1323, 1325, 1329, 1333).

The larger holders cost less to construct per unit of capacity than the smaller ones; but it is only within the last few years that the progress of the art has made it possible to construct the largest holders (*Record*, p. 658); and it would be plainly confiscation to value Appellee's holders constructed prior to that date, upon the cost of reproducing its entire holder capacity in five million foot Units.

Moreover, the sizes of holders are adjusted to the requirements of special districts; and it would obviously be uneconomical to establish an immense distribution holder in a section representing a relatively small consumption of gas, even though such a holder might cost less per unit of capacity than the smaller one which would meet the requirements of the community.

The Attorney General, however, not only takes as his unit the largest holders now in existence on Manhattan Island, but his value of his single 3,600,000 foot holder includes no engineering or interest charge, which together amounted to 15% and were added by Mr. Mayer in lump, as a final item of his computation (*Record*, pp. 1320-1).

(f) Other Items of Assets.

The valuation of real estate is reduced by the Attorney General to $10,422,106.30 (*his Brief*, p. 94), upon the theory that the immense holders assumed in place of Appellee's present holders, will release some land; and of course it falls with the objection to that method of valuing such holders.

Moreover, in his tabulation (p. 94) the Attorney General includes $7,852,151.03 as the value (book value or cost to Appellee) of "mains and services"; whereas, this sum is the book value of "*mains*" *alone* (*Record*, p. 5034),—the present value of services being $1,994,000 additional, and even their book value $1,212,000 (*Record*, pp. 432, 5034).

6. Assumption of Transfer of Capacity to Astoria.

It is not considered necessary to enter upon a criticism of the Attorney General's estimate of the expense of the construction at Astoria of a water-gas plant of 50,000,000 cubic feet of daily capacity, which, with the first Unit at Astoria already constructed, would meet Appellee's maximum day's sales of 70,000,000 cubic feet *in 1905*.

The construction of such a capacity at Astoria would take so many years, and the cost would be subject to so many considerations, that it is not seen how any aspect of such a speculative discussion can be of interest in the present action.

It will be observed, however, that this would involve the abandonment of all Appellee's Manhattan plants, with a loss of $10,400,000 in efficient apparatus, as shown by Vice-President Addicks (*Record*, p. 1588); and to make good such enormous depreciation would require charges in the operating cost of gas, which it would be impossible to consider with gas at 80 cents (*Record*, p. 1587).

As to the propriety of such a summary and wholesale slaughter of existing plant, we quote from the Attorney General's Brief (p. 115), on another point, as follows:

> "*Neither the Consolidated Gas Company nor any other company has the legal right to abandon efficient and modern plants for the purpose of substituting therefor modern and efficient plant of greater capacity, at the expense of the public under the cover of the charge 'on account of depreciation.' * * * Abandonment, as here, is the arbitrary scrapping of plant that could serve the public for years to come. It is in a sense willful destruction of plant.*"

And so far, too, as concerns more than four-fifths of Appellee's capacity, now in water-gas, it can hardly be claimed that Appellee could realize any economies in production by a transfer to any other site.

It may be observed in closing, that in his computation of cost of reproduction at Astoria, the Attorney General has again (p. 95) included, under the heading "Mains and Services", the book value (and not even the present value) of "mains" alone.

POINT V.

Valuation of Mains.

That the present value of Appellee's 822 miles of mains based on cost of reproduction is at least $12,636,000 (*ante*, p. 6), was found by the Master and Court upon overwhelming testimony (*Record*, pp. 176–8, 390, 398, 432). It did not rest upon the testimony of Superintendent of Mains Simpson, but was corroborated by Dr. Humphreys and admitted by Appellants' witness Marks to be "moderate and fair" (*Record*, pp. 177, 2786).

Appellants object to this valuation and argue for the substitution of "original cost", which they place at $7,852,000.

> NOTE: Referring to the 822 miles of mains valued, counsel for the Public Service Commission (*Brief*, p. 78) refers to 27 miles thereof, valued at $103,207.01, as "disused mains." They were merely temporarily cut out but still a part of Appellee's useful gas property. Some mileage of mains will, at any time, be found cut out for the purpose of putting in new joints, or on account of interruption of their operation by City construction of water pipes, or of some other contingency. All "*abandoned*" mains had been charged off on Appellee's books, leaving the 822 miles remaining (*Record*, p. 1681).

1. "Original Cost" of Installation.

At the outset it may be noted that the *cost of installation* of the mains "in the first instance," is not shown to have been only $7,852,000. It was certainly in excess of said sum, which is the "Cost to Complainant" thereof (*Record*, p. 254).

(a) Said $7,852,000 represents, in large part, mains taken over by Appellee in 1884, at an appraised value based on the then price of $25 a ton for pipe (*Record*, p. 691), laid under the inexpensive pavements then existing. The balance represents mains laid since, under similar inexpensive conditions for pipe, and largely so for pavements.

Indeed, the $12,636,000 representing present value, was based on a valuation of pipe of only $28.90 per ton (*Record*, pp. 691, 2994).

(b) But the six constituent Companies began business at various times from 1823 to 1876, and installed their main systems in large part while pipe was $60 or even $76 per ton (*Record*, pp. 2046, 2991).

The books of the constituent Companies gave no line on the cost of the Mains. Referring to the subject of Mains with other tangible property, and the amount at which they were carried on the books of said Companies, the Master said (*Record*, pp. 178–9):

> "In many instances the figures thus appearing on the books were reached after charging down as depreciation *very large sums which represented the actual cost.* Such charging down was in addition to and exclusive of expenditures for current repairs and renewals necessary to keep the plants of the Companies in efficient condition. For example, in the case of the Manhattan Company, it appears that during a period of 10 years there was written off on account of mains, meters and services alone the sum of $768,517.96, while during that period the additions to those accounts amounted to but $147,630.70."

(c) In summary, it may be said that the mains were in large part originally laid under conditions of *expensive pipe* and *cheap*

pavement; while the present valuation of $12,636,000 is based upon *cheap pipe* and *expensive pavement.* It is impossible to say with certainty, at this time, which basis would result in the higher valuation.

2. No Ground for Exception of Mains from "Present Value" Rule.

If, as both reason and authority indicate, "present value" based on cost of reproduction generally governs, no reason is perceived why Mains should be excepted. The valuation must be consistent throughout. "Cost of installation" can not be accepted as to one item, and "present value" as to another. And if "cost of installation" were found to be the true rule, it would appear that Appellee's "plants" cost more than the Master's valuation, which is practically the same as Appellee's "book value" therefor; for the appraised (Appellee's "book") value, at which Appellee took over the plants of the constituent Companies in 1884, *was less than they were carried on the books of the constituent Companies, even after the latter had charged them down by millions of dollars to "conceal earnings"* (*ante*, pp. 17–18).

If the "present value" of Appellee's entire property becomes, from what may be called "natural developments," less than original cost of creation,—*and there is no clear evidence that, taken as a whole, the present valuation may not be so,*—the loss is Appellee's, and consumers of its gas can not be required to make up such loss; and, conversely, if from like "developments" it has become more valuable than such original cost, that is Appellee's gain, and such consumers can not demand free enjoyment of the increment.

Nor, is this proposition original with Appellee. It has been asserted in this Court, in cases of the highest importance, by State authorities in defense of rate legislation. Thus, in *Smyth v. Ames*, the Nebraska Board of Transportation and Attorney General, strenuously maintained that the only proper basis of valuation of the Union Pacific Railway System was the *cost of reproduction*, and *not the higher cost of construction*, of the same.

And a good rule does not become a bad one if, in some other case, cost of reproduction exceed original cost.

3. Assumed Allowance for Future "Restoration."

It is suggested as one of the chief grounds of Appellants' contention that cost should prevail over present value, as to Mains, that—

> "Complainant has demanded, and the Court has allowed, a large amount on account of depreciation of Complainant's property, including mains, out of which they *are to be restored* (to wit: 11c. per thousand cubic feet), and it would be absurd to charge the public with a *fund to restore the mains*, and at the same time make the public pay Complainant a return upon the value predicated upon the additional expense that will be incurred thereby." *(Attorney General's Brief*, p. 101).

This statement would convey the impression that Appellee, in addition to actual current expenditures to repair and replace mains as use requires, had been allowed to lay up a reserve or other out "*fund*" of which the mains at some time in the future "are to be restored."

(a) As will be hereinafter noted, *no such accumulating fund has been allowed.* Indeed, not even enough to meet the *average* of Appellee's *current expenditures for repairs and renewals* in the up-keep of its property, including mains, for the last twenty years, *which the Attorney General concedes (post*, p. 141); although such expenditure, as to Mains, was based chiefly upon the old and inexpensive pavement which could be replaced at from 15c. to 25c. per square yard, whereas the expense of replacing the new pavement is from $2.70 to $8 per yard *(Record*, p. 178).

(b) Nor is it true that 11c. per thousand cubic feet was allowed, on Appellee's sales. This allowance was made *only on the gas made by Appellee*, and not on all the gas which it sold and which went through its mains and general distribution system.

(c) And if a "fund" had been allowed, of the formidable

character imagined by Counsel, it might have furnished grounds for the reduction of the "fund," but not for a lower valuation of investment or a reduction in the reasonable rate of return thereon.

4. Present System of Mains Normal.

It is said that the six constituent Companies, by whose consolidation Appellee was formed in 1884, had independent systems of mains. This of course is true, but in general they covered *independent territory.*

We do not find in the Record the statement of Mr. Simpson quoted by the City (*Brief*, p. 58) as to be found at page 698 of the Record. But Mr. Simpson does in substance say (*Record*, p. 698) that it is possible, but he "*does not think it is practicable*" on account of the vast expense involved, to make all the mains of Appellee "uniform." That would be true of any Company, anywhere.

The mains of no Company in business for nearly a hundred years, or much less period, will be found "uniform" in size at every point. Mains might now be installed 30 inches in diameter where seventy-five years ago a diameter of 8 inches would have been ample; and no Company would have been justified in installing 30 inch mains for the consumption of that day.

Appellee's system of mains has grown up naturally to meet increasing consumption; over 56% of the City blocks have only one main and over 86% have two mains or less (*City's Exhibit* 102, p. 1653 of Exhibits); duplications "beyond a line on each side of the street" occur "mostly on the avenues and on Broadway" or on the "crosstown streets in the lower end of town * * * particularly large and important streets like Canal", where there is heavy consumption (*Record*, p. 3330); a "*single pipe*" system of mains would involve services of great length, often diving under subway obstructions, and *involving greatly increased cost of maintenance* (*Record*, pp. 673, 3914, 3972, 4182), *the City not permitting Appellee to lay its mains in the middle of the street*, even if the centre

of most avenues and many cross streets were not already occupied by street railway and other construction (*Record*, pp. 719, 3953); and in short, in New York City above all places, such a single pipe system, involving one big main in place of two smaller ones, would even *de novo* be unwise and uneconomical, *and cost more than the present system* (*Record*, p. 3972).

That all present mains are required is indicated by the City's "One hundred and Seventh" Assignment, where it declares that the Court "should have found that the distribution system as now existing is *inadequate for the output of Complainant*" (*Record*, p. 475).

POINT VI.

Valuation of "Services," "Meters and Miscellaneous," "Working Capital" and "Special Franchises," as allowed by the Court.

1. "Services" and "Meters and Miscellaneous."

The same observations apply to present valuation of "Services," $1,994,000, as to the allowance of mains at present value.

As to "Meters and Miscellaneous," $4,100,000, we understand no objection to be raised by the Assignments.

2. "Working Capital" and "Special Franchises."

We understand no objection to be raised by the Assignments to the allowance by the Court of $1,616,000, for "Working Capital." *The Appellee, however, believes that as a matter of law the finding of the Master for "Working Capital," $3,616,000, should be accepted;* and that phase is considered hereafter (*post*, p. 77).

The subject of "Special Franchises," $12,000,000, as allowed by the the Court, is considered in a separate Brief.

POINT VII.

Corroborative Evidence of Conservatism of Valuation of Appellee's Property, taken as a whole.

At the conclusion of his review of the valuations of the Master, the Court said that the method of estimate adopted by itself and the Master it believed to be—

"The only method of valuation practicable in this case." (*Record*, p. 399).

But, while it was the judgment of the Court that exact figures could not be reached by any other method, it was able to say that Appellee's—

"entire capitalization does not seem disproportionate to its entire business." (*Record*, p. 399).

The Court draws attention to the fact that the Stock has apparently been "at times the subject of speculation," so that "recorded prices have varied so widely as to render any safe conclusion impossible;" and that, furthermore, its capitalization involves the ownership of electric lighting Company and other securities, so that the capitalization devoted to the gas business cannot be segregated. (*Record*, p. 399).

1. Market Value of Appellee's Stock.

If, however, it is considered by this Court that the market value of Appellee's capital securities is, nevertheless, of some significance, it will be noted that the market value of Appellee's Stock at the time of the trial was found, *on request of Appellants*, to be $192.33 per share (*Record*, p. 277); at which rate the amount of capital stock alone, invested in Appellee's gas business, $41,356,000 (*Record*, p. 260), would show a total market value of $79,539,994.

And if, to eliminate the effect of investments in other Companies, e go back to the year 1899, before Appellee had made such in-estments and while its capital had not been increased beyond the 39,078,000 authorized in 1884 (*Record*, pp. 153, 211), the Master nds an average market value in that year of $193 per share, at which rice Appellee's share capital *at only $39,078,000*, represented a aluation of $75,420,540; while, at the average price between 1885 nd 1899, $155.80 per share, the Master finds that said share apital of $39,078,000 would represent a value of $60,883,000 (*Record*, p. 211).

Each one of said valuations, exceeds the "present valuation" of Appellee's property, under the Decree (*Record*, p. 432).

3. Comparison with Assets of Other Gas Companies.

The Master also finds that the valuation found by him (and much more would it be true of the lower valuation reached by he Circuit Court) is most conservative when compared with the alue of property of other Companies furnishing a similar service in ther large Cities; and this is the case in spite of the fact that, as he Master finds,—

> "There is no City, not even Chicago or Boston, where land is so expensive as in New York, nor, as it would appear, is the cost of construction elsewhere so high" (*Record*, p. 212).

The valuation of Appellee's "permanent plant and property" (excluding franchises and good will) as found by the Court, repre-sents only a trifle over $3.60 per thousand feet of Appellee's sales; and only $4.60 of sales of Appellee's *own production alone*, although that divisor is clearly inadequate and unfair so far as its distribut-ing system is concerned.

(a) The Master finds that the capitalization of the Boston Com-pany, under an Act which expressly provided that the acceptance of such capitalization should not be an admission on the part of the Company—

> " for any purpose that the par value of such capitalization is equal to the value of its property or to the value of the property necessary for the conduct of its business "—

was " a little over $5.00 per thousand feet " of sales; while the value of the assets of the Boston Company as then appraised approximated " $8.00 per thousand feet " *(Record*, pp. 212, 2084).

(**b**) The capital of the Chicago Companies was found to be over $6.00 per thousand feet, upon the testimony of the Appellants' witness Professor Bemis *(Record*, p. 2569); and the Chicago Committee, in charge of the recent investigation—

> " found $5.00 per M. of sales to be a fair valuation for 'structural value and working capital only' " *(Record*, p. 213).

(**c**) So, too, in Baltimore, the same witness testified that the value of the entire property of the company there could be fairly computed at twenty times the net profits of the company from its gas business *(Record*, p. 2571)—the charge in Baltimore then being $1.00 per thousand *(Record*, p. 213); at which rate, taking even the net profit of Appellee as found by the Court, $4,015,475.02 from Appellee's own product only (*Record*, p. 432), Appellee's assets would be valued at upwards of $80,000,000.

(**d**) And the Laclede Gas Company, supplying the City of St. Louis, has a capital of $8 per thousand feet of production *(Record*, pp. 2532–3).

(**e**) While according to the statistics of the United States census for 1900, respecting the value of property employed in the gas industry, the " average structural value per thousand feet sold " throughout the United States, was " $7.23 " per thousand feet *(Record*, p. 214).

POINT VIII.

Appellee's Tax Reports, and Testimony before the Legislative Committee in that Connection.

This subject was thoroughly considered by the Master (*Record*, pp. 214–216). It was also exhaustively presented by the Appellants, in the Court below, but does not seem to have been considered by the Court of sufficient importance to require comment.

So much stress seems, however, to be laid by Appellants upon it, that a brief reference thereto is thought proper.

1. The "Tax Reports."

The first Tax Report incorporating the items criticized, was made to the *local Assessors* of The City of New York in 1902; and subsequent ones to the local Assessors, and to the State Board of Tax Commissioners under the "Franchise Tax" law, followed the same form—adjustment being made in each case for additional property meanwhile acquired (*Record*, pp. 1245, 1246).

As illustrating all, the Master quoted as typical the Report to the State Board for the year ending June 30, 1904 (*Record*, pp. 214, 5276), as follows:

	Investment as shown by Ledger.	Value stated in Franchise Tax Report.	Difference.
Real Estate	$11,216,479.71	$11,216,479.71	
Plant	15,755,462.88	8,456,595.71	$7,298,867.17
Mains	7,571,808.83	*3,666,531.38	3,905,277.45
Services	1,227,931.86	*594,625.01	633,306.85
Franchises and Rights	7,781,000.00	7,781,000.00	
Stocks of other Companies	46,674,034.27	46,674,034.27	
Bonds and obligations of other Companies	8,686,744.70	8,686,744.70	
Material and Supplies	697,014.92	697,014.92	
Accounts and Bills Receivable	1,944,968.09	1,944,968.09	
Cash on hand	1,146,866.87	1,146,866.87	
Unclaimed dividends	39,052.50	39,052.50	
Metropolitan Fund	500.00	500.00	
Meters, Stoves and other personal property	3,630,772.12	2,667,329.77	963,442.35
Totals	$106,372,636.75	$93,571,742.93	$12,800,893.82

*Stated in the Tax Report under the heading "Present Value allowing for depreciation." "Reproduction" value stated as $5,613,221.12 for Mains and Services, detail of which (not asked for and not given in Tax Report to State Board) is as follows:

For Mains	$4,829,925.82
" Services	783,295.30
Total	$5,613,221.12

It will be observed, that the figures in the tax report differ from their "book value" *in only four items; (a)* "Plant," *(b)* "Mains," *(c)* "Services" and *(d)* "Meters, Stoves and other personal property."

The first two items in the second column, $11,216,479.71 and $8,456,595.71, appear in said Tax Report at one point or another as a single item, $19,673,075.42, for "Real Estate and Plant."

(a) As to Plant.

Referring to "Plant," which is the principal item of difference, the Charter of The City of New York (*Chapter 466, Laws of 1901, § 889*) provides in relation to assessments for taxation, that there shall be reported to the Commissioners of Taxes and Assessments by their deputies, a description of real estate with the sum for which in their judgment said property "under *ordinary* circumstances would sell".

A gas plant cannot be transported to another point; and upon sale of the land for "ordinary" improvement would be of value simply as "scrap", no matter how great its original cost or value as an operating concern, except for the salvage of a small amount of water gas apparatus (*Record*, p. 1702). Hence, as Appellee knew by experience (*Record*, p. 1703) and Appellants' witnesses admitted (*Record*, pp. 2451, 2822), if the land on which a gas plant is located be sold for "ordinary" use, it will bring only *the value of the land with an insignificant addition for the plant thereon.*

The Tax Reports, made up in view of this statute, under advice of counsel (*Record*, pp. 1702-3), assumed that sooner or later one-half of the land with the plant thereon might be sold upon Appellee's removal of its generating plants to Astoria, which was then contemplated for some time in the future; and the total valuation of land and plant for the Tax Report was accordingly computed on the following basis: *The full value of the land as appearing on the books*, plus the book value of *one-half the plant*, plus a few hundred thousand dollars to represent the possible *scrap* value of the other half of the plant when the land on which it stood should be sold (*Record*, pp. 1702, 1703).

These figures as to "Plant" were made up by Chief Engineer Bradley, for the use of Vice-President, then Secretary, Carter, who

executed the Report (*Record*, p. 1702), and were based *solely* on the special provisions of said § 889 of the Charter as construed by counsel (*Record*, p. 1246).

The result, as pointed out by the Master (*Record*, p. 215), was the figure for "Plant" shown in the Tax Report.

(b) As to Mains.

The amount of $4,829,925.82, or rather the unit rates upon which it was computed, were prepared by Superintendent of Mains Simpson for the use of Mr. Carter (*Record*, pp. 689, 1755). This amount represented *bare cost of laborand material in laying the mains in soft earth* (*Record*, p. 720), excluding all allowance for rock excavation, sub-surface obstructions, asphalt or new block pavement, engineering expenses, wear and tear on apparatus, and various other items which go to make up the total cost and value of the mains as actually laid and existing under the pavements of the City of New York to-day (*Record*, pp. 690, 1753–1755).

Mr. Simpson knew that the figures were desired for a tax report, and believed that the most favorable basis of installation might be assumed in that connection (*Record*, p. 1754); for the extra cost of Mains, due to obstructions and expensive conditions, adds nothing to their *earning power*, beyond what would exist if they were all laid under the least expensive conditions.

It appears that 25 per cent. was taken by *Mr. Carter* from the total of Mr. Simpson's figures, to produce the amount of $3,666,531.38 shown in the Tax Report; but this was not based on any assumption of a physical deterioration of the property, but on Mr. Carter's theory that the smaller sizes of mains would from time to time in the future be replaced by larger ones (*Record*, p. 1242).

(c) As to Services.

The figures for "Services" were not made up by Mr. Simpson or the Engineering Department (*Record*, pp. 1241, 1242). They

were prepared by some one before Mr. Carter had anything to do with the Tax Reports, and he continued to use them without question; but they are now conceded to be incorrect "even for the purposes of taxation" *(Record*, pp. 1241, 1242).

(d) As to Meters and Miscellaneous.

The tax figures represent in this case the "book value" (cost to Appellee), less 25 per cent. deducted by Mr. Carter as an estimate of what might be obtained for them at a "forced sale," and not as an estimate of value to a going concern *(Record*, p. 1241).

(e) In General.

It is obvious from the facts before the Master that the valuations in the tax reports *did not and were not intended to show the structural value of the property as an operating concern, or the cost of its reproduction (Record*, p. 1243).

As the Master has said *(Record*, p. 216).

> "It is a matter of common knowledge that reports, petitions and similar papers required in connection with matters of taxation are, in the case of large corporations, ordinarily prepared by counsel. To some extent they are in the nature of pleadings, and are so drawn as to support the theory on which it is hoped to secure the most favorable results, either before the tax officials or the Courts. Under these circumstances, when, as in the present case, it appears that taxes are being constantly contested, it must very commonly occur that views are expressed on behalf of the corporation more or less inconsistent with the valuations it would put upon its property for purposes of sale, condemnation, or such an action as the present. This has been recognized to a certain extent by the Courts."

It has been in terms held, in the lower Federal Courts, that such reports constitute no estoppel, when the question in controversy is "actual value or cost of reproduction"; and that, when explained by credible testimony, they may be disregarded.

Louisville R. R. Co. vs. Brown, 123 Fed. Rep., 946, 949;
Southern Pacific R. R. Co. vs. Board of Railroad Commissioners, 87 Fed. Rep., 22.

2. Testimony Before Legislative Committee.

The only officer examined before The New York Legislative Committee of 1905 (Stevens Committee) respecting the tax reports, was Vice-President, then Secretary, Carter who executed them; and only *a part* of his testimony before that Committee was read into this record by Appellants.

It appears that Mr. Carter was called before the Committee from a sick bed (*Record*, pp. 1239, 1240), without any notification of the subject upon which he was to be examined, or opportunity to refresh his memory, or ascertain the exact method of making up the data in the Tax Reports (*Record*, pp. 1240, 1247); that he is not an engineer, and that the figures therein as to "Plant," "Mains," and "Services" were made up and handed to him by other individuals as above stated (*Record*, pp. 1239, 1702, 1703, 1753-1755); and that, with the meagre information derived from them, he did assume the figures in the tax reports to be the true "value" for the purposes therein stated (*Record*, pp. 859-861, 1008-1010).

But he made it quite clear to the Committee before leaving the stand, that the valuations of plant given in such reports represented neither "cost" nor "reproduction value" thereof (*Record*, p. 1243), but were figures which "took into consideration the removal to Astoria and abandonment of the generating plant" in Manhattan (*Record*, pp. 1243), which was the fact (*ante*, p. 61).

It is to be borne in mind that the investigation of the Stevens Committee was *ex parte*, hasty and incomplete (*Record*, pp. 952, 953; *post*, p. 176); and that the Company neither had opportunity to go into the subject later before the Committee, nor did it occur to the Company that any one could assume that the tax figures represented the structural value of the property as an operating concern (*Record*, pp. 1246-1247).

Basis of "Tax Valuations" Promptly Explained.

It also appears that, at the first opportunity, which developed before the Gas Commission a few months later, and in view of the weight which had been laid by the Stevens Committee on the tax reports (*N. Y. Senate Doc. 30 of 1905*), Messrs. Bradley, Simpson and Carter explained in detail the basis on which the reports had been made up, being then able, after investigation and reference to proper data, to testify with exactness on that subject (*Record*, pp. 720, 721).

This was, of course, before the Order of the Gas Commission, which was made February 23d, 1906, and also long before the passage of the "80 cent gas Act" here in question. *Hence, neither the Legislature nor the Commission could have been in any manner misled as to the basis of the "tax report" figures.*

3. Appellants' Witnesses on the "Tax" Valuations.

It is unnecessary to argue here whether the methods of computation employed in making up the tax reports were legally sound; it is sufficient to show that they did not indicate the value of the Appellee's property as an operating concern devoted to the public service,—*and this is shown and conceded by Appellant's own witnesses.*

Thus, after deducting theoretical and impossible depreciation,—

(**a**) as to "Plants," the valuation of both Appellants' witnesses was much above the figures of the Tax Report (*Record*, p. 175);

(**b**) as to "Mains," witness Marks declares that $12,636,150 is a "moderate and fair" estimate of present value (*Record*, p. 2786), and Edgerton's estimate, when supplemented by items of cost omitted by him, amounted to $13,510,299.86 (*Record*, pp. 3926, 3927);

(c) as to "Services," Marks admits that a "book value" of $1,212,000 is "moderate and correct", even for original "cost of installation" (*Record*, p. 2786);

(d) and as to "Meters and Miscellaneous," no one contradicts Mr. Carter's statement of present value at $4,100,000 (*Record*, p. 748).

It is difficult to see on what theory Appellants can hope to advance as controlling in this action, these "tax report" figures, *which are repudiated by their own witnesses as less than the true valuation of the items in question on any basis.*

Appellants' Further Inconsistency.

It will be observed, too, that while Counsel for the Public Service Commission strenuously asserts that the valuation of Appellee's Plant should be reduced by the "depreciation," which he says, Appellee itself has "continued to claim in its tax reports, based upon an intended early removal to Astoria and consequent scrapping of the Plant" (*Brief*, p. 65), he also contends with equal vigor against the inclusion in Appellee's assets of a *corresponding part of the Astoria Plant, which would in such event take the place of this Manhattan property scrapped,* or the inclusion in the computation of cost of gas to be derived by Appellee therefrom, of any return on said Astoria investment.

PART SECOND.

Items of Property of Appellee, aggregating $11,361,565, included by the Master but excluded by the Court, which Appellee contends should as a matter of law be reckoned in its gas assets, thereby increasing the $59,831,435 allowed by the Court *(ante,* p. 6) **to $71,193,000.**

POINT IX.

Items of Property Included by the Master but Excluded by the Court, which Appellee Contends should, as a matter of law, be reckoned in its Gas Assets.

The Appellee submits that the following deductions by the Court, from the Master's statement of property properly held by Appellee in its gas business (*ante,* p. 6), were not legally justifiable and should be restored to the computation:

Real Estate (Land)	$1,311,565
Working Capital	2,000,000
National Coke & Coal Company	50,000
Franchises and Good Will ($20,000,000), in place of Franchises alone ($12,000,000)	8,000,000
Total additions	$11,361,565
Valuation of Property already allowed by the Court (*ante,* p. 6)	59,831,435
Total valuation here claimed by Appellee	$71,193,000

In addition to which it is contended that the value of the "Astoria plant" (or "Property of other Companies" producing gas sold by Appellee), $12,000,000, must be directly included in the capital upon which a return is to be earned, *unless* such return be included in the computation of cost to Appellee of the gas derived by it from subsidiary Companies.

The foregoing items represent *the entire difference between* the allowance by the Master and the allowance by the Court, as indicated in the table hereinbefore set forth (*ante*, p. 6); except that the additional item of "Real Estate" as above claimed, $1,311,565, is less than the difference between the Court and the Master ($1,475,565), by the sum of $164,000 explained below, on this page.

A. Additional Real Estate $1,311,565.

The Master found the entire real estate of Appellee to be of the value of $14,161,000. (*Record*, p. 160); from which he excluded a piece of water front property at Shadyside ($300,000), and a block formerly of the 18th Street plant ($400,000), finding that Appellee was entitled to include as real estate held in its gas business the balance of $13,461,000 (*Record*, pp. 165-166, 247).

A few parcels included by the Master were not actually covered by apparatus, though in most cases acquired for a distinct purpose in connection with Appellee's business,—some of them for immediate use; *and these the Court excluded as not "actually in use"* (*Record*, pp. 395-396, 423), the Decree (*Record*, p. 430) reading as follows:

> "The real estate valued by the Master at $13,461,000, included certain parcels held by Complainant for future use, but not at the date of the beginning of this action actually in use by it, in its gas business; and omitting from the capitalization of Complainant for the purposes of this suit such unused parcels, the valuation of the portion of such real estate actually and necessarily employed by it in its gas business at said date is hereby fixed at $11,985,435.00."

The difference between the Court and Master amounts to $1,475,565; but of this $160,000 represents a piece of land under water (*Record*, p. 396), and $4,000 a clerical error in substraction (*Record*, p. 396). Without waiving its claim as to said land under water, Appellee contends here that at least the net balance of $1,311,565, represents land reasonably acquired and held by Appellee and either in use or prudently held for subsequent use, and should be allowed as a proper investment in its gas business.

The items constituting said $1,311,565 consist of certain parcels designated in Appellants' Briefs below as "Land Leased," "Land Vacant" and "Land Unimproved," and deducted by the Court originally at a value of $2,141,155 (*Record*, p. 394); but it was subsequently pointed out that $829,590 thereof had not been included by the Master in his total of $13,461,000 (*Record*, p. 423), which left a corrected balance thereof deducted by the Court of $1,311,565, constituted of the following parcels:

Lots in Block	Master's Valuation.	Referred to as
985	$42,500	"Land Leased."
690	55,000	" "
978	59,500	" "
1092	30,500	" "
1156	14,500	" "
1692	7,500	" "
952	31,000	" "
1683	18,000	" "
1643	85,000	"Land Vacant."
1455	220,000	" "
1156	25,600	" "
1999	261,800	" "
2175	65,415	" "
972	22,000	" "
1474	25,000	" "
690	55,000	"Land Unimproved."
715	12,250	" "
952	10,000	" "
987	114,000	" "
1071	57,000	" "
1683	100,000	" "
	$1,311,565	

It is respectfully submitted that the important question is: **Has the Company acquired, and does it hold, land beyond the requirement of fair business prudence, considering the character of its business and the probabilities of its expansion?**

The plots in question were, as the evidence shows and the Master notes, almost without exception small fractions of a large block, the remainder of which was actually covered by the Company's operating plant (*Record*, p. 1232).

1. "Land Leased."

Of the so-called "*Land Leased*," the lots in block 985 adjoin two gas holders and property used for storage (*Record*, pp. 161, 1232); in 690 form part of Appellee's Eighteenth Street works, part of which had been taken in condemnation by the City (*Record*, pp. 161, 539–540, 1232, 1579); in 978 form a part of a large parcel, the balance of which is used for gas works (*Record*, pp. 161, 1231); in 1092 and 952, are fractions of large plots the balance of which is used for gas-making (*Record*, pp. 161, 1231), and are occupied in part by workmen of the Company (*Record*, pp. 161, 1234–1235); in 1156, are part of a plot intended for a valve house (*Record*, pp. 161–162, 1232); in 1692, are part of the Ninety-ninth Street works and are occupied by a foreman of Appellee's Street Department (*Record*, pp. 162, 1232); and in 1683, are lots contiguous to Appellee's stable and intended for the enlargement thereof, a part being now used to turn out horses in (*Record*, pp. 162, 531, 1233).

Referring to said "*Land Leased*" the Master says (*Record*, pp. 162–3):

> "The leases of the foregoing parcels are, as a rule, terminable on 30 or 60 days' notice. In almost every case the lots in question are *fractions of a large plot, the remainder of which is actually covered by the Company's operating plant, or they are immediately adjacent to portions of such plant.* They are available at any time for purposes of extension by reason of the termination clause in these leases.
>
> "The tenement houses are to a considerable extent occupied by employees of the Complainant, *whose advantage it manifestly is to have its employees near at hand in case of emergency.* The proper conduct of Complainant's business requires a large land area and when the property was originally acquired by Complainant or its constituent Companies, it can hardly be doubted that it was sound business policy to purchase these entire tracts, notwithstanding the whole area of each block purchased might not be immediately required. Ordinary business prudence required the Company to anticipate the growth of the Company and the requirements of increased business. If odd lots occupied at the time by tenement houses, for instance, had been cut out, they would detract from the value of the balance of the block and hamper

the Company in making such necessary extensions or additions as might from time to time be required. In plants as large as those of Complainant it is inevitable that there should be here and there a small lot not covered at the moment with material or apparatus, but which, *in view of the requirements of the business* it would be extremely poor policy to sell. Its use may at any time be required. The Company would not, of course, be justified in buying and holding real estate merely because of the fact that it was likely to enhance in value and irrespective of any necessity therefor in the business of gas making. On the other hand, *it seems clearly unreasonable to require that every plot of land owned by the Company should be occupied to its utmost capacity and in constant use, in order that such property should be considered as part of the Company's gas making investment. In my judgment, none of the property in question can properly be regarded as unnecessary, under the circumstances.*"

2. So-Called "Land Vacant."

As to the so-called "*Land Vacant,*" the lots in 1643 were bought and intended for an office building (*Record*, pp. 163, 531, 532, 534, 554); in 1455, are held for building holders (*Record*, pp. 163, 552–553, 1232, 1580); in 1156, for a valve house (*Record*, pp. 163, 531, 534, 554, 579), *plans for which were already filed* (*Record*, p. 556); in 1999, were bought for holders, one already of which has been built, there being room for two more (*Record*, pp. 163, 535, 553–554); in 2175, are part of a plot where there is already a small holder and valve house, and only "portions of that property are unoccupied" (*Record*, pp. 163, 531–532); in 972, contain a pump house and well, although they were not "used much of late" (*Record*, pp. 163, 532); in 1474, were "unoccupied and unimproved" (*Record*, pp. 163, 531), and not yet appointed to any specific use (*Record*, p. 553).

It will be noted that as to one of these parcels plans for a "valve house" had already been filed, and that practically all of the balance had been acquired and held for some definite purpose.

As to said "*Land Vacant,*" the Master says (*Record*, p. 164):

> "Of the seven plots above described *only two are* wholly vacant. In view of their proximity to other property of the

Company, and in default of further evidence of unavailability than is shown by the record, I find that they may reasonably be considered as a proper part of its operating plant. In the single instance where the evidence gives no indication that the property is not used or intended to be used in some way in connection with the gas business, namely, the parcel on the south side of 15th Street, Block 972, the amount involved is not large. Its value, according to the witnesses for the City, is about $12,000. Under the circumstances and in view of the numerous uses to which the property of this sort can properly be put for storage and other purposes by Complainant, I am not disposed to exclude it."

3. So-Called "Land Unimproved."

As to the so-called "land unimproved," the lots in block 690, five in number, are used for "storing gas material" (*Record*, pp. 1232–1233); in 715, a single lot, is occupied as a wagon shed and paint shop (*Record*, pp. 1332, 1451), and was accepted and valued by Appellants' own witnesses as part of Appellee's gas property (*Record*, p. 3722); in 952, a small lot, is temporarily rented (*Record*, p. 1232); in 987, are adjacent to the Twenty-first Street works and are "used for storing coal" (*Record*, p. 533); in 1071, four lots, are used for storing coke (*Record*, p. 534); and in 1683, are occupied by Appellee's "stable and wagon yard" (*Record*, pp. 534, 535, 1233–34), being exclusive of the two "leased lots" above mentioned in that block.

It will be observed that all but one of these so-called "unimproved" parcels *were actually in use.*

As to said "*Land Unimproved*," the Master, after excluding the 18th Street Block to the value of $400,000 as aforesaid, continues (*Record*, p. 165):

> "As to the remainder of the property in respect of which a deduction is claimed, part of which has already been considered under Land Leased, the only proof introduced by the City consisted of a statement showing its assessment for purposes of taxation for the year 1906 as vacant land. The mere description of a particular parcel as 'unimproved' or 'vacant' in an assessment roll is not sufficient foundation for

the conclusion that the property is not used by Complainant in its gas making business. It may very well be, and the *proof in many instances showed that the parcels assessed as vacant land were used for purposes necessary in connection with Complainant's business, as, for example, the storage of coal, coke, pipe fittings, tools, and castings.*"

Use of Said Lots.

The necessity of the "unimproved" blocks for storage of material was questioned below by one of the Appellants, on the ground that Appellee's coal contracts called for delivery *as required;* but in such a vast business it would be indefensible conduct, for Appellee to live by hand to mouth delivery, and take the risk of blizzards, coal strikes and other contingencies which might result in the complete closing down of its works. No "damages" could mend such a situation.

Nor do we overlook the observation of the Court (*Record*, p. 423), upon Appellee's Supplemental Application to include $338,500 of the "unimproved" land as "actually used" (*Record*, p. 423), that the $11,985,435 of real estate allowed by it was intended to cover all real estate *used* by Appellee and could not be "translated into an exactly accurate statement by metes and and bounds", making reference in this regard to contentions advanced by Appellants as to the necessity of the use of the land occupied by the 111th Street plant (*Record*, pp. 423–424). But the *distributing* station there was in full operation, and the Court apparently overlooked the fact that there is at said station only $140,853 of *manufacturing* apparatus (we quote the figure from the Brief of one of the Appellants below), and that the land there—except so far as covered by that small amount of apparatus—is actually in use for Appellee's Street Department (*Record*, pp. 534–535).

And, of course, the observation of the Court does not touch the balance of said $1,311,565 of land, which is not "in use," but *purchased and held for use and some of it actually at the point of improvement*, which the Court does not purport in any way to include.

4. Necessity of Seasonable Acquisition of Lands.

To construct a common holder of even three million feet capacity will take a year at a minimum, and probably longer *(Record*, p. 553); and if Appellee were to wait until the moment when it must begin the construction of such apparatus, and then rush into the market to procure a large plot for the purpose under compulsion of paying whatever price might then be exacted from its necessities, instead of exercising ordinary prudence and taking advantage of a favorable opportunity to purchase at a lower price in good season, *Appellants and all consumers of gas might well complain of the Company's action, and assert that it should not be entitled to a return upon the exorbitant cost of real estate, which—by the exercise of common foresight—might have been seasonably acquired at a lower figure*

5. No Appreciable Burden on Consumers.

There is no appreciable burden on present consumers, by reason of these parcels. The Master said *(Record*, p. 163):

> "It may be pointed out further that the fact that these properties are rented as above described does not necessarily impose any additional burden upon the consumers of gas, notwithstanding their value is included with the assets of the Company on which it is entitled to a return. The real estate rents appear as part of the miscellaneous income of the Company and as will hereinafter appear, they are taken into account in determining the net profits of the Company applicable to dividends."

Thus such rentals, amounting to $37,000 per annum *(Record*, pp. 1922, 2341, 2759*)*, were credited by all witnesses, to reduce the cost of gas *(Record*, pp. 1575, 1691, 1910, 2341); and to return 6% on the entire value of the excluded land, would require an additional sum equalling only a small fraction (less than 4/10) of one cent per thousand feet of gas sold.

6. Admission by Appellants.

Appellant, *The City of New York, in effect concedes* Appellee's *entire position*, when it asserts (*"Third Exception" to Master's Report, sub-division 11.—Record*, p. 346), that Appellee is entitled to include only "such real estate as required by the present state of manufacture," with a "*reasonable margin for growth.*"

And all Appellants' witnesses (*Bemis, Record*, p. 2341, *and Marks, Record*, p. 2341) deduct the rentals derived from such excluded parcels (as part of Appellee's Miscellaneous Income) in their computations of the operating cost of gas—*thus, by necessary corollary, conceding the propriety of the inclusion of said real estate in the gas capital of the Company.*

7. The Court's Exclusion Based on a Misconception.

The Court, while recognizing that "many of the pieces of land just considered are adjacent to portions of the plants of Complainant" and "that as to some a definite purpose of utilization is testified to", excludes them because (among other things) of—

> "Recent actual occurrences in respect of the Astoria plant; which consideration convinces me that there is no intention on Complainant's part to extend or enlarge its gas business on Manhattan Island in such manner as to require any substantial addition to the lands already *actually applied* to the necessities of that business (*Record*, p. 394),"—

and the Court further intimates that the fact that the present value of Appellee's real estate now employed in its gas business exceeds the value, at one dollar per thousand feet, of the entire annual production of its Manhattan plants, is evidence that any increase in the use of Manhattan Island land would be "a business misfortune."

It is respectfully submitted that these assumptions and deductions upon which the Court apparently acted, are supported by no evidence whatsoever and are wholly erroneous.

(a) The fact that the land is worth more than the gross annual product therefrom, is not shown to differentiate the gas business from many other businesses conducted on the Island of Manhattan, which require land in their operation. Indeed, dividing the valuation of Complainant's land in Manhattan as found by the Court (a little less than $12,000,000) by its total sales (a little less than 13,300,000,000 cubic feet), the land valuation adopted by the Court will be found to represent only 90 cents per thousand cubic feet,—six per cent. return upon which amounts to only $5\frac{4}{10}$ cents per thousand feet of sales, to be paid by the consumer of gas as return on capital represented by land.

The amount permitted to be earned by Massachusetts Gas Companies, as return on their total gas investment, averages in the vicinity of 30 cents per thousand (*Record*, p. 6620), at which rate $5\frac{4}{10}$ cents for so important an item as "land," looks very small.

(b) And again, the theory that there will be no extension of Appellee's Manhattan plants because it is erecting a generating plant at Astoria, is based upon a complete misapprehension of the situation.

It is in evidence, as will be hereinafter indicated, that Appellee's Manhattan plants are unable to produce all the gas which it sells, and that its Astoria Unit, as just completed, is barely sufficient to *make up the deficit* in Appellee's own *manufacturing* capacity in Manhattan.

But the greater part of the land excluded by the Court has been acquired for extension of its *distributing system*, which must always be maintained on the Island of Manhattan under any circumstances, that is to say, for holders, valve houses, stables for its horses and the like. It is common knowledge that to accomplish a properly uniform distribution of gas, pressure holders must be located within the area of distribution; and they and similar appliances will necessarily be increased in the Island of Manhattan as Appellee's sales increase. Additional holders have been constantly required (pp. 587–8, 1719). It would be impossible, *and has been suggested by no witness as possible*, that such distribution could or should be

efficiently effected by holders located on Long Island, sending gas through miles of tunnel under the East River before reaching the distribution area.

It is submitted that the excluded parcels should be restored to the computation, and the allowance by the Court for "Real Estate," $11,985,435 (ante, p. 6), should be increased by the value of the above described parcels, $1,311,565 (ante, p. 67).

B. Additional Working Capital, $2,000,000.

"Working Capital", or "active capital" to use the term of Appellants' witness Marks *(Record,* p. 1942), exists in the form of current supplies, cash and accounts.

It is submitted that the finding of the Master ($3,616,000) as to Working Capital required *(Record,* pp. 179, 180), should be accepted in place of the conclusion of the Court ($1,616,000).

In making the deduction of $2,000,000, the Court again, from unfamiliarity with a great record, apparently acted under a misapprehension as to the evidence. Its conclusion was not only not based upon a preponderance of evidence, but (it may be fairly said) is supported by no evidence whatever.

1. Mr. Carter's Testimony.

It rests, it would appear, upon the supposed testimony of Vice-President (formerly Comptroller) Carter (*Record,* p. 396), whose actual testimony was *directly to the contrary of that assumed by the Court.*

On amount of "working capital" required, the Court says that Appellee's

> "own Comptroller should * * * be the best judge of its own necessities; and his measure of working capital *in the sense of cash* is $1,000,000. $616,000 is taken as a *fair average of outstanding bills payable;* and the aggregate of these two sums is as much as the Comptroller claimed, until on suggestion he added $2,000,000 thereto, to represent the average amount of outstanding bills receivable."

We agree that the Comptroller is the best judge of Appellee's necessities, and that his measure of working capital "in the shape of *cash*" is $1,000,000; but in the balance of the statement the Court is completely in error.

The $616,000 is not "a fair average of outstanding bills payable," *nor is it "bills payable" at all!* That sum was the value of current *gas material* on hand (*Record*, p. 179); so that the Court allowed nothing for accounts, although evidently thinking it had done so.

Nor did the Comptroller advance the $2,000,000 of accounts as an afterthought, or "on suggestion," to quote the words of the Court. *It has been Appellee's claim throughout*, that, in addition to $616,000 of material on hand, it requires $3,000,000 of working capital in the shape of cash and accounts,—about $1,000,000 in cash and $2,000,000 in accounts.

Exactly this was claimed in the Bill of Complaint herein (*Bill of Complaint, Record*, p. 7); and the Record shows that Mr. Carter, before going upon the stand, had prepared an Exhibit showing in convenient form the "book-value" of working and other capital, employed by Appellee in its gas business (*Record*, pp. 942, 946), that this Exhibit showed current supplies of $616,470.08, an amount of $1,000,000 in cash *and $2,000,000 in accounts* (*Record*, pp. 748-50, 5033, 5034), that said exhibit had been offered and received in evidence (*Record*, p. 744), and that he was *testifying in support of this very Exhibit prepared by himself* at the point at which he said (as quoted by the Court) that $1,000,000 *in cash* was required (*Record*, pp. 749, 750). The inquiry as to whether the $2,000,000 in accounts shown on said Exhibit, was also required, was merely to spread upon the record his statement as to the necessity of that item of his Exhibit and on that point Mr. Carter testified (*Record*, pp. 750-751):

> Q. Do you consider Two million dollars as a fair amount of accounts which may be outstanding in your business, and in that shape as capital? * * * A. I think that would be the fair amount, or would be the usual amount, I might say, due to the company from various parties for that kind of service.

Q. Capital that is tied up? A. Permanently tied up.
Q. Or included in the accounts? A. Yes.
Q. Continuously tied up? A. Yes, continuously would be better.
Q. It is always there; can never be paid out, can it? A. No, sir.
Q. You have to have that margin? A. Exactly.

These amounts were a fair average; the amount of working capital actually tied up in cash and accounts at that time *greatly exceeded* the $1,000,000 and $2,000,000 respectively (*Record*, pp. 749-750, 5034).

2. The Other Evidence.

(a) Dr. Humphreys, from vast experience, testified that 30 cents per thousand feet was a fair requirement for working capital (*Record*, pp. 1684, 1685), and on this basis Appellee, for 1905, would require $3,974,000.

(b) Appellants' expert Marks advanced *no independent opinion*, but selected four Massachusetts Companies, whose requirements he declared to be entirely comparable with those of Appellee as to active capital (*Record*, pp. 179-180, 1941-1942). The active capital of these four Companies he first testified to be 13 cents per thousand feet, equivalent to $1,726,000 for Appellee (*Record*, pp. 180, 1942); but in his later examination he admitted that he had inadvertently omitted a considerable part of the capital of those Companies evidenced by "notes payable" (*Record*, p. 2078), and thereupon corrected his computations and *upon his own theory* computed that such Companies were employing about 48 cents per thousand cubic feet for active capital, and that Appellee upon that basis would require a working capital of $6,375,000 (*Record*, pp. 180, 2077-2078). *This was his final expression on the subject.*

NOTE.—Mr. Marks' method was to take the entire assets employed, and to deduct therefrom the value of *permanent* plant as shown by the Companies' reports—the balance being necessarily "active" or working capital (*Record*, pp. 1941, 2078).

Appellants' Counsel sought below to parry Mr. Marks' blow, by the suggestion that the proceeds of said "notes payable" were invested in "permanent" plant. That feature is, of course, wholly immaterial, and has no bearing on the result.

Having found the active capital to be $852,246, or 52c. per M. of sales (*Record*, pp. 1941–2), he proceeded to deduct therefrom all sums which appeared to have been contributed by *others than stockholders*; whereas, the *source* of derivation of working capital is a matter of no importance whatever.

(c) Dr. Humphreys, analyzing five Massachusetts Companies mentioned in another connection by Professor Bemis (which included the four cited by Mr. Marks), ascertained that they were employing as working capital 43 cents per thousand feet of sales, equivalent to $5,961,690 for Appellee (*Complainant's Ex. 385, Record*, p. 6624).

(d) Professor Bemis, who had no experience in the gas business, in his computation allowed the current supplies, $616,000, and also cash to the amount of $1,000,000 (*Record*, p. 2394) for working capital—a total of $1,616,000; and stated as his only reason for not allowing the additional $2,000,000 in accounts, that accounts due to Appellee might be considered in the "nature of a surplus" (*Record*, p. 2394). *He did not deny that the $2,000,000 was required*, but excluded it because of its supposed *source*, which was no reason at all. But even this was exploded, for it was subsequently shown that such $2,000,000 was in no sense a "surplus," but that the resources of the Company had been employed and were bound up in the delivery of the product for which these accounts were due (*Record*, p. 4449).

(e) It may also be noted that the Company reserved $1,303,000 of working capital at its creation in 1884 (*City's Ex. 48, Record*, pp. 5729–5730); although its sales of gas at that time for the following year (1885) were only 3,942,433,000 cubic feet (*Complainant's Ex. 85, Record*, p. 5039). The $3,616,000 of working capital allowed by the Master is substantially less per unit of sales than provided in 1884.

3. Summary.

The foregoing summarizing the entire evidence on the subject, it is obvious that the Court's reduction of working capital to $1,616,000 was not only unsustained by any evidence, but was in direct conflict with all the evidence, both individual opinion and experience of Companies in other cities.

It is respectfully suggested that the amount required for Working Capital in the gas business is best known by those experienced therein ; and that the Court was not justified in disregarding their evidence and experience, as it did in lopping off more than one-half the Working Capital of $3,616,000, found by the Master to be required.

The Court to be sure suggests, as one reason for the reduction, " that Complainant's credit is of the highest," but this has no relation whatever to the amount of working capital required. It merely renders more easy to Appellee the acquirement of " working ", or any other, capital which its necessities demand.

Moreover, it is submitted that Appellee is not legally bound to travel on " credit " ; it is entitled to capital sufficient to pay its way as it goes.

It is submitted, therefore, that the Court's allowance for " Working Capital," $1,616,000 (ante, p. 6), should be increased by the sum of $2,000,000, as above claimed (ante, p. 67), making a total of $3,616,000 as found and included by the Master (ante, p. 6).

C. National Coke & Coal Company, $50,000.

Until recent years, Appellee directly sold and delivered its surplus coke, arising from its production of coal-gas.

Some years ago, however, for its convenience it incorporated the National Coke & Coal Company, with a capital of $50,000, which amount Appellee paid in, receiving the entire Stock of that Company in return *(Record*, pp. 753, 814). It is in fact the " Cartage Department " of Appellee.

The method pursued has resulted in higher receipts from its coke residual (*Record*, pp. 2341, 2409); and while the investment of $50,000 was included by the Master in Appellee's capital, the earnings of the National Coke & Coal Company, paid back to Appellee in dividends ($5,000, amounting to 10% on the capital, in 1905) were credited by it to reduce by so much the operating cost of gas (*Record*, pp. 2341, 2552).

Counsel acting for some of the Appellants expressly conceded on the Record that this $50,000 investment must be included in Appellee's gas capital (*Record*, pp. 753, 754, 813-814); and the experts representing the City (Marks and Bemis), in their computations *deducted the dividends received by Appellee from the National Coke & Coal Company*, in reaching their cost of gas (*Record*, p. 2341),—which could only be on the theory that the investment was part of Appellee's gas capital.

It is submitted that the Master was right in including this item of $50,000 in Appellee's capital, and crediting the income therefrom in computing Appellee's profit from its gas business; and that the amount should be added to the items allowed by the Court, as above claimed (ante, p. 67).

D. Good Will, $8,000,000.

It is also Appellee's contention that there should be included in its gas assets, the value of the "Good Will" of its business; and that, accordingly, there should appear in the schedule thereof (*Record*, p. 432), $20,000,000 representing "Special Franchises and Good Will" as found by the Master, instead of $12,000,000 representing Special Franchises alone.

This subject is treated in a separate Brief; and will not be pursued here beyond the foregoing statement of position.

If Appellee's contention be sustained, it will add to the Court's allowance (ante, p. 6), the sum of $8,000,000.

E. The Astoria Plant (i. e. Capital Invested in Production of Gas Secured from other Companies).

The Court, as hereinbefore noted, while excluding this item ($12,000,000) at this point, conceded that a return thereon should come into the cost of gas by another route,—to wit: by inclusion in the cost of gas to be derived by Appellee from other Companies (*Record*, pp. 406, 407, 425, 426).

To avoid misapprehension, the Decree—following the valuation of Appellee's assets at $59,831,435 (*Record*, p. 432)—continued (*Record*, p. 433):

> "The foregoing items do not include the amount of Complainant's *investment in the securities of other gas Companies*, from which Companies it was obtaining a large part of the gas which it delivered to its customers, nor the *value of the property of such other Companies* or any part thereof employed in the production and delivery to Complainant of such gas."

The subject will be considered at length below. Nothing need be added here to the statement of Appellee's contention that its investment in its Astoria plant should be included in *some form* in its capital, upon the same principle that it claimed (and Appellants admitted before the Master) that its investment in The National Coke and Coal Company should be so included.

PART THIRD.

Gas Purchased from Subsidiary Companies, and Valuation of the Property of Subsidiary Companies Employed in the Production Thereof.

POINT X.

The Astoria Investment of $12,000,000.

In approaching this subject, it will be instructive to review the situation existing at the time of the passage of the Acts in question, and of the beginning of this action in May, 1906.

Appellee's sales for the year 1905 amounted to 13,283,163,767 feet, representing a production of 13,587,020,322 feet before deduction of leakage or "unaccounted for" gas (*Record*, p. 220); and such sales were expected to increase, and Appellants' experts believed they would largely increase, from the growth of population alone.

But Appellee's 18th Street *manufacturing* plant had recently been taken by The City of New York for public improvements (*Record*, pp. 511, 1703), a part of its 111th Street manufacturing plant had been in part taken even earlier by the same authority (*Record*, pp. 516, 4578, 5561), and the possibility of extension of its other plants on Manhattan Island had been curtailed by the laying out of marginal streets, cutting them off from the water front (*Record*, p. 511); so that Appellee had been able to manufacture at its own plants only 10,419,461,426 feet of such sales of 1905, or nearly 3,000,000,000 cubic feet less than its total requirements,—which balance it procured from certain controlled Companies under temporary arrangements hereinafter defined.

It is apparent, therefore, that Appellee's property alone did not represent the entire investment required to produce and distribute the said 13,283,163,767 feet of gas.

1. Construction and Capacity of Astoria Plant.

The conditions which it saw advancing, although it could not then foresee the condemnation of its 18th Street plant or the great increase in consumption consequent upon the "coal-strike" of 1902-3, induced Appellee, about 1900, to begin the construction of the first Unit of a coal-gas plant at Astoria on Long Island, which should be capable of a maximum day's production of 20,000,000 feet of gas, representing (under a well-recognized formula—*Record*, p. 1511) a capacity of about 4,000,000,000 cubic feet per annum. This Unit was intended to supplement Appellee's manufacturing capacity on the Island of Manhattan; and subsequent Units, if and when constructed (except so far as they also might be required to provide for increased sales), were to replace an equal capacity in Appellee's Manhattan plants,—although such replacement, involving an abandonment of Manhattan plants at a loss of over $10,000,000 for good apparatus discarded (*Record*, pp. 876, 1239, 1588), is not to be thought of with gas at 80 cents (*Record*, p. 1587).

Referring to this situation as existing in 1905, the Master says (*Record*, p. 185):

> "The producing capacity of the first Astoria Unit (20,000,000 feet per day) is equivalent to 4,000,000,000 feet per annum, or about 1,000,000,000 feet more than the gas actually purchased from these Companies during 1905. **The maximum daily output of Complainant during 1905 was about 70,000,000 cubic feet, while the maximum capacity of its own plant was but 51,000,000 feet.** Adding to this the maximum capacity of the first Astoria Unit, would give a maximum daily capacity of 71,000,000, or nearly 1,000,000 more than Complainant's maximum daily output. This surplus, according to the testimony of Mr. Bradley, which was uncontradicted, is insufficient for purposes of a reserve. He stated that, in his opinion, it was not safe to operate gas plants for lighting large Cities like New York with less than 20 per cent. reserve of their manufacturing capacity.
>
> "Furthermore, with an output so closely approximating the maximum daily capacity, it is clear that no allowance is made for increased sales of gas consequent on the growth of population. That such increase is to be naturally expected, is conceded by all parties. *It appears, therefore, that the*

amount of gas to be produced by the first Unit of the Astoria plant is under, rather than over, what was actually required in addition to Complainant's own output to meet the reasonable demands of its business in 1905."

And so, too, the Court, in reviewing the situation, says (*Record*, p. 407).

> "The 3,000,000,000 feet purchased in 1905 *was not enough for Complainant's wants.* The Astoria plant was calculated for 4,000,000,000 feet, without any reference to a decrease in the price of gas. The increase in consumption during the years when prices were steady at a dollar per thousand, was such as *reasonably to justify this provision;* entirely apart from the necessity for a reserve, which the demands of the consumer have lately made impossible."

The Astoria plant was not completed and in operation in 1905, although it was so far completed in December, 1906, while this action was on trial, that it then began operation and delivery of gas to Appellee (*Record*, pp. 4226, 4292); and it is now in position to furnish to Appellee the gas which in 1905 the latter acquired from other sources.

Its total cost and value is found, without contradiction, to be $12,000,000 (*Record*, pp. 183, 254, 390),—all of which has been advanced by Appellee, and largely raised by sale of Appellee's 6 per cent. Debentures, convertible into Appellee's Stock (*Record*, p. 742) at the option of the holder.

> NOTE—Counsel for the Public Service Commission seeks to throw doubt on the finding that Appellee's sales amounted to about 70,000,000 per maximum day, and suggests that Appellee had "daily station records" showing the facts, but did not produce them (*Brief*, p. 103). He is entirely in error. All "station records" requested for the period in question were presented. Indeed, *the entire operating records of Appellee were put in evidence* for the period from November 1st, 1904, to December 31st, 1905, so that all the information Appellee had was available to the Appellants (*Post*, p. 97). The "daily station records" of Appellee show the daily *production of Appellee's plants*, but not Appellee's maximum day's *sales*, since such sales include a large additional amount of gas received from subsidiary Companies which is not recorded at Appellee's stations. The statements of subsidiary Com-

panies show the amount delivered by them *monthly*, and not daily; but, presumably, Acting President Addicks would be able to approximate very closely the amount of the maximum day's demand. The Master so concluded, and so did the Court below, as the above expressions indicate. Appellee's Chief Executive certainly ought to be in a position to make as reliable an estimate as any Counsel in this case.

2. Necessity for Present Construction.

Objection was made below, to consideration of the Astoria plant, on the ground that its construction was unnecessary, *in view of the capacity of other subsidiary Companies.*

In point of fact, the capacity of Appellee and its subsidiary Companies combined, was inadequate without Astoria. The maximum day's capacity, assuming that each Company could reach its *full theoretical capacity on the same day*, is as follows:

Appellee (*Record*, pp. 616, 636)	51,000,000
All other Companies combined (*Record*, pp. 616, 636)	60,200,000
Total	111,200,000

The maximum output of all Companies in 1905, according to the testimony of Chief Engineer Bradley, was about 100,000,000 cubic feet (*Record*, p. 636), which left a reserve on basis of sales *of three years ago* of only 11%, or a trifle over one-half of the 20% reserve without which Mr. Bradley testified that it would not be "safe to operate" (*Record*, p. 1708).

Indeed, had the New Amsterdam plant, with its capacity of 30,000,000 cubic feet, been incapacitated by any accident shutting down the works or blocking the East River tunnel, or even been reduced in output one-half, the combined production of all other Companies would not have been sufficient to meet the requirements of consumers on the maximum day.

Moreover, a coal strike or other mishap which would compel the use of coke instead of coal in Appellee's water-gas plants, would reduce their capacity 20% (*Record*, p. 1655), and likewise leave a deficit.

No Ability in Appellee's Manhattan Plants to Meet Deficit.

(a) As to Appellee's own plants in Manhattan, it has already been shown that in 1905 they produced 10,419,461,426 cubic feet of gas, or more than their rated annual capacity (*ante*, p. 84); and the only manufacturing capacity unused was the *generating apparatus* at 111th Street, of a value of only $140,853 (*ante*, p. 73), and of a capacity of only 2,420,000 cubic feet per day (*Record*, p. 1467), or only about one-eighth of the deficit between the theoretical maximum day's capacity of Appellee's other plants (51,000,000 feet—*Record*, p. 616) and its maximum day's sales of about 70,000,000 feet (*Record*, p. 1654). Indeed, it would make up but a small part of the difference between the actual maximum day's *production* of Appellee in 1905, which was 42,459,000 cubic feet (*Record*, p. 1586), and such theoretical capacity of 51,000,000 cubic feet. It, therefore, in any circumstances would be of insignificant importance in dealing with the deficit in question.

But this 111th Street apparatus consists of *generating apparatus only* (*Record*, p. 1468), the nearest purifiers, condensers, scrubbers and other auxiliary apparatus, which would be used to refine the gas made at 111th Street, being located and in use at the 99th Street station; and the value of such 111th Street apparatus is as a "reserve" against a breakdown of *manufacturing* apparatus at 99th Street, in which event the production of the 99th Street generators would be cut out and would offset the 111th Street generators which would come in.

(b) The point was also made that when one of the experts of Appellants viewed the plants in 1906, a considerable number of coal gas retorts at 14th and 42nd Streets were not in use; and Appellants proceeded to argue that they were available for any deficiency.

If they had been so available, they would only at the utmost have raised the production to the theoretical maximum capacity of 51,000,000 cubic feet; but they were out of action at the time of the visit in question, because Appellee—on

account of the coal famine—*was unable to secure coal to operate them (Record*, p. 4227). Appellants overlook the facts that these contingencies are *incidents of the gas business;* that shut-downs from one reason and another are constantly occurring in such a vast enterprise; and that if these retorts had been in action, on the doctrine of averages some other retorts or apparatus somewhere else would have been out of service, on account of repairs or other contingencies.

(c) In short, the suggestion that there was any surplus "capacity" in Appellee's Manhattan plants, which would have rendered unnecessary the construction of the Astoria plant or made it possible to produce in its own plants more than the 10,419,461,426 feet of sales which it did manufacture, is fanciful, based upon strained deductions, takes no account of the character of the business, and is fully disposed of by the findings of the Master and the observations of the Circuit Court in relation to capacity, to which attention has already been drawn.

3. Form of Appellee's Ownership.

Instead, however, of building said plant in its own name, Appellee, for convenience, constructed it through the medium of a subsidiary corporation formed by it under the name of The Astoria Light, Heat & Power Company, Appellee receiving from said Company all its Stock, Bonds and other obligations, representing and as evidence of Appellee's investment and ownership (*Record*, pp. 183, 752).

As the Court says (*Record*, p. 397):

> "Such projected addition to the gas-making equipment of New York and vicinity was to be, and was while in process of construction, the property of The Astoria Light, Heat & Power Company, all of whose Stock was and is owned by the Complainant, and whose works will, when completed, *be as completely identified with Complainant's enterprises, as is the comparatively insignificant Coke & Coal Company.*"

Indeed, so completely was said Astoria plant created, owned and controlled by Appellee that the Master, regarding the rule that "the abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth" (*Seymour* v. *S. F. C. Association et al.*, 144 N. Y., 333, 340; *Anthony* v. *American Glucose Company*, 146 N. Y., 407, 413), said (*Record*, p. 183):

> "There would seem to be no ground for the purposes of the present inquiry, for drawing any distinction between a plant built and operated directly by Complainant and one built and operated by a subsidiary corporation, of which it owned the entire Capital Stock. No reason is apparent why the capital invested in the plant of such subsidiary corporation is not to be treated precisely as if invested in any of the manufacturing stations of Complainant on Manhattan Island."

4. Legislative Acts Look to Future.

The Court held in substance that the Acts of 1905 and 1906, here in question, necessarily look to the future; that in testing their validity, the value of the plants which will produce and distribute the gas sold by Appellee (whether made by itself or by others for it) should be considered in determining the value of assets employed; and that consequently the *Astoria plant*, whose cost and value are exactly ascertained,—rather than the plants of other Companies, which supplied the excess requirement in 1905,—should be considered in fixing the value of the plant which, under the Acts in question, will produce the gas to be acquired by Appellee outside its own Manhattan plants (*Record*, pp. 400, 407, 432).

POINT XI.

Property of Subsidiary Companies Actually Employed in Producing Gas, Received by Appellee from them in 1905.

But if it is desired to consider the value of the plants in reality employed in 1905, for the production of the 3,000,000,000 cubic feet (more or less) in that year delivered to Appellee by other Companies, this also is covered by the findings of the Master (*Record*, pp. 185–186) :

> "In default of any better method of estimating the amount of capital employed in the production of the 3,000,000,000 feet of gas purchased by Complainant in 1905, it seems entirely proper to measure it by the standard of the known cost of the Astoria first Unit. Equipped, as it is, with the most modern machinery, and located on a site much less expensive than could be procured on Manhattan Island, the cost of the first Unit *seems a fair and safe basis of valuation.*"

And he therefore finds and allows Item No. 8 ($12,000,000—*Record*, p. 155), not as the Astoria plant, but explicitly as the value of "*Property of other Companies employed in the production of gas delivered by them to the Complainant*" *in 1905* (*Record*, pp. 186, 253–4).

The Master had before him ample data upon which to reach this conclusion.

1. Value by Comparison With Accepted Units.

It appeared that all the Companies from which Appellee was obtaining gas (New Amsterdam, Standard, Central Union and Mutual) were manufacturing in the City of New York under generally similar conditions, and producing the like kind of gas at

practically the same holder cost (*Record*, p. 241); but the land of the other Companies was likely to be more valuable on the average than Appellee's, since they were operating chiefly in the more congested part of Manhattan, while Appellee was operating also in the outlying districts (*Record*, p. 4471).

(a) That the value of Appellee's plants would be a fair index to the value of the plants of such other Companies, per unit of capacty, would be a fair assumption; and it is also testified that the cost of any standard gas plant of a given capacity may be closely estimated by comparison with similar plants, and the use of cost units well established and understood (*Mayer, Record*, p. 1457).

Thus water-gas *apparatus* (with necessary buildings) costs (depreciation deducted) to produce, from $120 to $124 per thousand feet of capacity (*Mayer, Record*, pp. 1424, 1458); and the Master, *at the request of Appellants*, has found that—holders excluded—"$123 per thousand feet of capacity * * * is a fair unit to assume as the value of the water-gas plant, *no matter what the capacity might be*" (*Record*, p. 264).

As to *holders*, they run in cost from about $100 for a few enormous holders, to $250 or more for smaller holders, per thousand feet of capacity (*Record*, p. 1727). Taking all the holders of Appellee, an average assortment, we find their value with accompanying apparatus to have been (depreciation deducted) $7,046,074.00 (*Record*, pp. 1320, 1323, 1326, 1329, 1331, 1333, 1334, 1336, 1337, 1340-2, 1473-5), with an aggregate capacity of 45,142,500 cubic feet (*Record*, pp. 540-1, 1319, 1323, 1324, 1326, 1329, 1331, 1333, 1336, 1337, 1339-41), showing an average value of $156.10 per thousand cubic feet of capacity.

This valuation for standard holders rests not only upon Mr. Mayer's testimony, but upon the testimony of Appellants' only witness (Logan) who had any practical experience in building holders in the City of New York, whose valuations virtually concurred with Mr. Mayer's (*Record*, p. 173), and of their expert Marks, who likewise confirmed Mr. Mayer's (*Record*, p. 3753), and

finally upon the admission of counsel who, when Appellee proposed to introduce further evidence on the subject, conceded that Mr. Mayer's valuation of holders was acceptable (*Record*, p. 4602).

The holder capacity should at least equal the maximum day's output (*Addicks, Record*, p. 1644; *Bradley, Record*, p. 1707), and it is advisable to have it 50% larger (*Bradley, Record*, p. 1707). It will be observed that Appellee's total holder capacity as above recited exceeds the maximum day's *production* of its works in 1905 (*Record*, p. 1587).

As to *land*, even upon the valuation of the Court ($11,985,435), which excludes all land not now *actually used* in manufacture and distribution, we find the same to amount to about $237 per thousand cubic feet of Appellee's maximum day's theoretical capacity, which, as elsewhere said, is more than any actual or possible day's output,—although Appellee's land is overcrowded with apparatus in some plants (*Record*, p. 1507).

(b) Assuming an outside plant capacity of 20,000,000 cubic feet per maximum day as found by the Master and Court to be required (*ante*, pp. 85–6), although the hiatus between Appellee's maximum day's sales as found by the Master and the amount of its own actual day's maximum output was much greater, the computation of the value of such a plant on the foregoing basis is as follows:

Water-Gas Apparatus and Appurtenances at $123.18 per M. of capacity	$2,463,600.00
Holders equal only to a single day's capacity of the works at $156.10 per M. of capacity	3,122,000.00
Land at $237 per M. of capacity	4,740,000.00
Total	$10,325,600.00

But this is not the entire valuation, for it includes—

(*a*) No valuation of *Mains* and *General Distribution System* of the outside Companies necessarily employed in delivering gas to Appellee's Mains and Holders;

(*b*) No amount for *Working Capital* necessarily employed in producing and delivering this gas;

(*c*) No allowance for the expensive tunnel of the New Amsterdam Company, through which it delivers its gas from its Long Island plant to Appellee (*Record*, pp. 181-3, 3981)—the cost of Appellee's similar tunnel being shown to be $2,650,000, including lining (*Record*, pp. 182, 1642, 1645-6);

(*d*) No holder capacity beyond the capacity of a single day, although Mr. Bradley says that it should be 50% greater (*Record*, p. 1707);

(*e*) No allowance for the fact that a part (though small) of the gas obtained by Appellee from other Companies was coal-gas. Appellee buys from the Central Union Gas Company (*Record*, p. 5287). That Company makes coal and water-gas (*Record*, p. 2328). A coal-gas plant costs much more per unit of capacity than a water-gas plant (*Record*, p. 1728).

(e) Moreover, as above suggested, a plant of 20,000,000 cubic feet per day is *much below the capacity actually required to be maintained in subsidiary Companies* for Appellee's account in 1905, as was clearly indicated by both the Master and Court in discussing the like capacity of the Astoria plant (*ante*, pp. 85-6).

Thus, Appellee's actual maximum day's production did not exceed 42,459,000 cubic feet (*Record*, p. 1587), which meant a deficit of over *27,500,000* feet in relation to the maximum day's sales of 70,000,000 feet,—*excluding all "reserve" capacity which safe operation requires.*

The 51,000,000 feet mentioned by the Master is the theoretical day's maximum, *taken separately for each of Appellee's five plants*, and added together (*Record*, p. 1586); and it is utterly impossible in practice to rely upon all said plants being at the same moment in operation at their maximum. Hence *on no single* day can Appellee be expected to produce 51,000,000 feet of gas. Something is always happening in such enormous plants. In 1905 some retorts were shut down because the western coal famine prevented delivery of the usual quantities of gas-coal in the East (*Record*, pp. 4059-4076); and it is impossible to foresee when, to what extent, or how long a particular plant must be shut down or limited in production for one cause or another (*Record*, p. 643).

Nor should it be overlooked that said subsidiary Companies in 1905 carried in behalf of Appellee all the "reserve capacity", re-

quired by Appellee above its actual sales. Such reserve is at least 20% for safe operation, as the Master points out upon undisputed testimony (*Record*, p. 185), and this means 14,000,000 feet more of plant capacity maintained by subsidiary Companies for the benefit and safety of Appellee and its consumers.

Doubtless the Master had these considerations in mind in his finding that "the amount of gas to be produced by the first Unit of the Astoria plant" (20,000,000 feet per day), was "*under, rather than over, what was actually required in addition to Complainant's own output, to meet the reasonable demand of its business in 1905.*"

2. Estimate and Admission of Appellants' Engineer.

Mr. Marks, Appellants' Engineer and expert witness, computed the value of the plants producing said 3,000,000,000 feet, at $5,097,389, which he added to his valuation of Appellee's own property, upon which a return must be earned (*Record*, pp. 1940, 2787).

He reached these figures by employing a unit value of $1.78 per cubic foot of annual capacity, deduced from four Massachusetts Companies which he declared to be entirely comparable with Appellee (*Record*, p. 1940); but this unit was shown to have been based on an erroneous assumption as to the capacity and assets of the Companies examined, and far too low (*Record*, pp. 186, 6623-8).

3. Conclusion.

The Master's findings as to the daily capacity required outside of Complainant's plants in 1905, and the value of the property employed in meeting it, $12,000,000 (*Record*, pp. 186, 155), were based on substantial *data*. They were confirmed by the Court by the general clause at the opening of the Decree (*Record*, p. 430).

PART FOURTH.

Cost of Gas and "Net Income" to Appellee under the Statutes in question.

POINT XII.

Period and Scope of Examination as to Operating Results.

The calendar year 1905 was selected for special study, with the concurrence of all parties.

As this action was brought on May 1, 1906, the year 1905 was the last calendar year available for examination; and it was also Appellee's last fiscal year (*Record*, p. 840).

Moreover, *the year 1905 was the first and only year available, which would in any degree give a definite line upon the effect of the Statutes in question on the cost of production.* Chapter 736 of the Laws of 1905 took effect July 1, 1905. That Act penalized Appellee for each failure to maintain 22 candle power in its gas (the penalty had before applied only to failure to maintain 20 candle power,—*City Charter, Chap. 466 of the Laws of 1901, § 522)*, and also imposed additional burdens in the line of "pressure" restriction as well as in the elimination of sulphur and ammonia.

The showing of previous years would, therefore, be of much less value than had the candle power, purity and pressure standards in those years been the same as provided in the Acts under examination.

1. Period Covered for "Operating Cost."

For convenience, however, detailed expenditures of Appellee were presented for examination, not only for the calendar year 1905 *(Complainant's Ex. 94, Record, Original page* 7337), but also for the year November 1, 1904 to October 31, 1905 as presented to the Gas Commission *(Complainant's Ex. 93, Record, Original page* 7336), in

order that the mass of detail in the Gas Commission record might be available in testing and checking, as suggested by Judge LACOMBE in his memorandum (*Record*, p. 144).

Thus the Master had before him complete results of the period November 1, 1904 to December 31, 1905; and in concluding its direct case Appellee placed in evidence all its original "operating ledgers" and other books of account, covering every detail of its operation for that period (Record, pp. 1861–1864, 5298).

But Appellants were not limited to this period in their examination. They were permitted in numerous instances and fields to go long distances back for the purpose of checking or pertinent information. In illustration:

(a) The Master required the production of balance sheets of Appellee for the years 1903 and 1904 as well as 1905 (*Record*, pp. 930, 931; original, pp. 7688, 7689, 7690).

(b) The great items in the cost of gas are the expenditures for coal and oil, and receipts from residuals; and the coal contracts were produced as far back as 1903 (*City's Ex. 16, Record*, p. 1066; also pp. 1057–1079); the oil contracts as far back as April, 1904 (*City's Ex. 10; Record*, p. 1055); and the coal tar and ammonia contracts as far back as June, 1898, June, 1899, and July, 1901 (*City's Exs. 29-a, b & c; Record*, p. 1080): and *these were all the contracts which Appellants then requested or expressed any wish to see*, as an examination of the Record will disclose.

(c) Moreover, Appellee produced for examination the book containing the oil and coal accounts, with detailed records of shipment and deliveries, covering a period as far back as 1903 (*Record*, pp. 1103–1114),—the price paid for such oil and coal being also shown in this record (*Record*, pp. 1103–1115).

(d) Furthermore, Appellants offered in evidence the monthly station-cost sheets of Appellee's manufacturing plants for the years 1903 and 1904 (*Record*, pp. 1530, 5298).

(e) One of Appellants' experts went over records of oil consumption and candle power as far back as 1902, and offered in evidence the figures and his deductions for that period (*Record*, pp. 5922, 5924).

(f) Appellee consented to the examination of its construction account (including its real estate transactions) *as far back as 1884*, and all of the books of the original six Companies in its possession in a similar manner *back to 1823* (*Record*, p. 2286); and the report of Appellants' accountant shows that they made such examination so far as they desired (*Record*, p. 5870).

(g) Appellee also consented to the examination of its records of repairs and renewals (including its depreciation charges) as far back as the Company's incorporation in 1884; and so well satisfied were Appellants on this score, that the annual record of "repairs and renewals" for the entire period was offered *by Appellants (State's Ex. L, Record*, p. 5078); and the Master, *at the request of Appellants*, found that 10.89 cents per thousand of sales were expended annually on the average by Appellee for current repairs and renewals for the twenty years prior to 1905 covered thereby *(Record*, p. 276*)*.

2. Particularity of Examination.

(a) Messrs. Marwick, Mitchell & Company, expert accountants selected by the Appellants, were in Appellee's offices for five or six weeks, with 25 to 35 men, engaged in the work of examination of Appellee's books and papers (*Record*, p. 4425). Every voucher, record and document of the Company relating to the subject was examined by these accountants (*Record*, p. 4424), and the thoroughness of their work is apparent from an examination of their report, abstracting and summarizing their labors *(City's Ex. 87, Record*, p. 5769*)*. The last named Exhibit shows that in some important lines of investigation they went far back of 1905 (*Record*, p. 5794).

(b) The mass of vouchers, and the time and labor involved in the examination of the items of Appellee's expenditures for a single year *(Record*, pp. 2286-2287*)*,—not to speak of the volume of the Record in this case,—indicate the impossibility (independent of the non-necessity) of the examination in equal detail of Appellee's operations for previous years, within any reasonable limit of time in the trial of this action. This was recognized by counsel for Appellants *(Burr, Record*, p. 1044*)*.

The learned Justice who appointed the Special Master, expressed in his memorandum on that occasion the expectation that the case could be tried so that the Master's Report could come up before the Court as early as the fall of 1906 (*Record*, p. 148);

while, in fact, with the utmost diligence, the case was not tried and the Master's Report submitted until the end of June, 1907, and argument was not had thereon until November following.

(c) It will be noted that as a further check upon the "operating expense" of Appellee, the station cost of its gas was carefully compared with that of other Companies operating in New York City and elsewhere *(Record*, pp. 241–242*)*.

The Court, on full consideration of the Appellants' arguments, expresses the Opinion that the "*Court has been furnished with sufficient facts*" *(Record*, p. 399*)*.

3. Cost of Gas in other years available.

Had Appellants been desirous to cite the results of Appellee's operations prior to 1905, or had they found such results in any way modifying deductions drawn from the periods specially examined here, they had the information at hand in the testimony and report of Arthur W. Teele, expert accountant for the Stevens Legislative Committee of 1905, who tabulated such operating cost in detail as found by him for the years 1901, 1902, 1903 and 1904 *(New York Senate Document 30 of 1905*, pp. 2555, 3027–3038).

The cost as found for the years mentioned, was as follows *(Record*, p. 84) *per thousand feet of sales :*

1901	61.55c.
1902	60.86c.
1903	61.71c.
1904	61.01c.

During no part of this period was the 22-candle power penalty provision, or were the present requirements as to purity and pressure, in operation ; nor did the figures include any allowance for "depreciation" or "contingencies" beyond *actual expenditure.*

The Gas Commission, for the year November 1, 1904 to October 31, 1905, found the cost of gas to be 60.75c per thousand feet of

sales, in addition to which they allowed 1.81c. per thousand for additional enrichment required by the new law, or a total of 62.56c. per thousand (*Record*, p. 32).

It will be observed that all these costs were substantially above the cost per thousand of Appellee's sales as found by the Court for 1905, to wit, practically 58 cents. This result is reached by deducting from the cost as found by the Master 65.84c. (*Record*, p. 237) the amount of items *ultimately* disallowed by the Court, $1,043,280.42 (*post*, p. 104), equal to 7.85c. per thousand feet sold.

4. Conduct of the Case before the Master.

Counsel for the Public Service Commission, who came into the case long after the trial of the action, and consequently had not the advantage of personal observation and touch, complains of the method in which the case was conducted before the Master, suggesting in substance that Appellee presented or withheld information at will.

The facts above recited, with the disposition made by the Circuit Court of a similar plea, might stand alone as a reply; but it may not be inappropriate to call attention to a few features.

(a) When Appellee, at the outset, for convenience of all concerned, presented summaries in much detail, of its receipts and operating expenses, it was always under the ruling of the Master, assented to by Appellee, that such summaries were received *subject to verification, either by examination of Appellee's books before the Master, or out of Court*, as might be arranged between the parties.

That this was understood, accepted and acted upon by the Master and all counsel, appears by reference to the Record (pp. 633, 735, 736, 778, 803, 866, 871, 875, 892, 893, 932, 1046, 1048, 1058-64, 3248 and many others). And before the conclusion of its case, Appellee (as above said) offered in evidence all its *original* books and records relating thereto.

(b) As the action was brought and the statute took effect on May 1, 1906, and the trial of the cause began on July 16, 1906, pursuant

to Judge LACOMBE's order, it was not a matter of inconvenience to select July 1, 1906, as a basis of examination,—it was *simply an impossibility* to have Appellee's voluminous records, in detail required for examination, brought up and tabulated as of July 1, 1906. Only one who has gone through such an experience, and knows the days and nights and weeks required to get such accounts and tabulations condensed, verified and in shape,—even when the ledgers are *written up* to a given date,—can fully appreciate the situation.

As Mr. Carter shows, considerably later than the beginning of the trial, Appellee's books had not yet been brought up to June 30, 1906 (*Record*, p. 905); and the very labor and strain under which all the office of Appellee were laboring, in preparation of data for presentation on the trial of this cause,—*much of it prepared (as the record shows) at the request of the Appellants and as an accommodation to them*,—made it doubly impossible to do so.

(c) Moreover, if it had been possible, it would not have given an equally intelligent and accurate result, to have taken a year which does not coincide with Appellee's fiscal year. The result instead of being absolute, is only approximate in such a case, since taxes for different years have to be apportioned and many items divided on a mere estimate,—as appeared before the Gas Commission,—instead of being exact figures which are worked out upon settled methods of entry for the fiscal year.

In fact, nothing would have been more satisfactory to Appellee than to have taken the year 1906, had it been feasible; for, it was in evidence that the assets of the Company *were increasing*, and its assets on July 1st, 1906, would have been greater than on December 31st, 1905,—thereby entitling Appellee to a larger allowance for return on capital.

(d) It is not the fact, as was intimated below, that examination of Appellee's books to July 1st, 1906, was demanded or refused. Moreover, the Master was in charge of the trial, and if Appellants had made any proper demand, he would no doubt have made a proper order, no matter what Appellee's attitude might have been. Certain

requests were made of Mr. Carter to *prepare a lot of tabulations for Appellants for use on cross-examination*, running down to July 31st, 1906, and he stated that the books had not been even written up to June 30 yet. We declined to undertake the labor of such *tabulations*, and the Master properly ruled that the presentation of such matter was a part of *Appellant's* and not of Appellee's case (*Record*, pp. 777–80).

(e) Counsel suggests that Appellee was allowed to prove the cost of additional items of "enrichment," "taxes" and "labor" occurring or foreseen in 1906. These items were not shown for the purpose of having them included *per se* in the operating cost of 1905. They were presented only as an illustration of the character of items *which Appellee had been claiming were and should be covered by the "reserve" or "contingent" fund* already included in its operating charges for 1905; and that the Master fully understood this and so treated it is entirely clear from the language of his Report (*Record*, p. 228).

The items were suggested as "illustrations" only, the same as samples of pipe were presented showing the effect of electrolysis.

(f) An examination of the Record will demonstrate that the Appellants were treated with the greatest liberality by the Master in relation to the introduction of evidence, and cross-examination of witnesses, the Master repeatedly stating in substance that as this was an equitable cause he would give great latitude to Appellants in the nature of evidence produced; and he accepted many items offered by them, against Appellee's objections, on the ground that they might throw some light on the issue although not strictly competent by ordinary rules of evidence (*Record*, pp. 1100, 1900, 1924, 1925, 1926, 1955–6, 2975, 3193–5).

(g) The suggestion that during the period specially examined, Appellee might have been getting its house in order by reason of the Stevens Committee Investigation, or in any way "padding" its accounts, is wholly gratuitous, and is supported by not a shred of evidence. *It could not be so.* The Stevens Committee did not begin its investigation until April, 1905,—six months after the

beginning of the period which the above statements of operation covered ; and absolutely the only change, in 1905, from previous years was the segregation of the ten cent " Contingent and Renewal " fund from the general Profit and Loss account of Appellee, Appellee's books showing precisely its exact receipts and expenditures as before (*Record*, pp. 4503–4) ; and when Appellee presented its statement of operations for 1905 (Exhibit 94), it *stated at the outset, through Mr. Carter, the nature, reason and analysis of this particular item* (*Record*, p. 840).

POINT XIII.

Computation by which Court reached "Net Income," $3,024,592.45 (*ante*, p. 6), **for year beginning May 1, 1906.**

In determining the operating cost of gas as a factor in such profit, both the Court and the Master took as their basis Exhibit 94 (printed in full in *Master's Report*, *Record*, p. 217), showing Appellee's complete expenditure in its gas business for the year 1905, totaling $9,936,910.42

From which the Master deducted Fixed Charges and other items (*Record*, p. 248) 1,190,645.23

Leaving Operating Expenses as found by the Master (*Record*, p. 248) $8,746,265.19

1. Preliminary Computation based on Sales of 1905.

The Receipts and Expenditures, and the Profit to Appellee, *according to the computations of the Court*, **the method of which we do not accept**, may accordingly be summarized as follows:

Receipts as found by Master (*Record*, pp. 248, 5052)			$13,730,193.50
Deductions by the Court from Income (*Record*, p. 405):			
Dividend from National Coke & Coal Company	$5,000.00		
Rental from Lands Leased, but excluded from Complainant's assets by the Court	37,408.88		
Receipts from gas acquired from other Companies	2,862,757.32		2,905,166.20
Income from sales of gas of Appellee's manufacture (*Record*, p. 405)			10,852,027.30
Operating expense, as found by the Master (*Record*, p. 248)		8,746,265.19	
Deductions by the Court from Expense (*Record*, pp. 404-5):			
Taxes on land excluded by Court from capital (*Record*, p. 423)	18,666.00		
Interest on Taxes for the year 1905	94,506.29		
Legislative Investigation Expense	25,671.74		
Franchise Tax Legislation Expense	63,401.65		
Contingent expense, including renewals	841,034.74		
	$1,043,280.42		
Net Cost of gas received from other Companies	893,432.40	1,936,712.91*	
Operating expense found by Court in production and distribution of gas			

* This is the $1,947,117.91 found by the Court (*Record*, p. 405), less subsequen correction for taxes, $10,405 (*Record*, p. 423).

of Appellee's own manufacture (*Record*, p. 423)			$6,809,552.28
Net profit on sale of gas of Appellee's manufacture (*Record*, p. 423)			4,015,475.02
Receipts from sale of gas secured from other Companies, as above	2,862,757.32		
Payments to other Companies for such gas (Item, 43 of Ex. 94—*Record*, p. 219)	997,039.89		
Apparent profit on acquired gas (*Record*, p. 405)			1,865,717.43
Apparent profit of Appellee at $1 rate, on all gas sold by it in 1905 (*Record*, p. 432)			5,881,192.45
Loss at 20 cents per thousand under the 80 cent rate, (*Record*, p. 248)			2,656,600.00
Apparent profit on Appellee's total gas sales in 1905, under the Acts in question			$3,224,592.45*

But the Court does not find that $3,224,592.45 is the fair or normal profit upon Appellee's sales for the year 1905. On the contrary (*Record*, p. 432):

> "The Court finds that **said sum of $1,865,717.43 represents more than a normal profit** upon the volume of purchased gas, in that the amount paid by Complainant to other Companies for the same ($997,039.80) was paid under temporary and expiring agreements, and *did not include any reasonable recompense or return upon the value of the investment required to produce said gas.*"

Hence Appellee's *normal profit* on its total business, if computed on the basis of the sales for 1905, must *(under the Court's view)* be reduced from $3,224,592.45, by the amount of the "reasonable

*This is the $3,234,997.45 first found by the Court (*Record*, p. 407) less subsequent correction for taxes $10.405 (*Record*, p. 423).

recompense or return" upon the value of the investment required to produce nearly 3,000,000,000 of such gas, as hereinafter computed.

Introductory.

(a) *It should be clearly noted at the outset*, that the Court made an error, most important in principle, in designating the sum of $1,865,717.43, obtained by deducting from Appellee's *income* from sales of gas received from other Companies ($2,862,757.32) the amount *paid* by it to such Companies ($997,039.89), as "*profit on purchased gas*" (*Record*, p. 432). The Court should also have deducted, *at least* a *pro rata* proportion of the distributing and general expense attendant upon Appellee's total sales,—to wit, 25.25c. per thousand (*post*, 113); which upon the sales derived from such Companies (2,863,702,341 feet), amounts to $723,084.84,—reducing said apparent "profit on purchased gas" to not exceeding **$1,142,632.39**, in place of $1,865,717.43. *This is clearly demonstrated* (*post*, pp. 112–114).

The erroneous theory which induced the Court to attribute no part of the distribution and general expenses of Appellee to such "purchased gas" *of 1905*, was also responsible for its failure to allow for *any additional distributing expense on assumed additional sales of 1,131,298,000 feet in 1906*, while charging Appellee with the receipts from such additional sales, as hereinafter pointed out (*post*, pp. 110–4).

The Court, it is true, included Appellee's *entire* general and distribution expenses, for 1905, in operating cost of gas of Appellee's manufacture only; but it is none the less important to note the error in principle.

(b) As to "**candle power**," the Master recognized that 1.83c., in addition to Appellee's "operating expense" for 1905, would be required for a full year to maintain "candle power" consistently above 22 candles (*Record*, p. 228); and even the Gas Commission allowed 1.81c. for that purpose (*Record*, p. 32). The Court con-

cluded otherwise (*Record*, p. 424); and while Appellee believes that injustice is done, it will not take the time of this Court to present the subject here.

2. Final Computation, for Year Beginning May 1, 1906, Based on Assumed Increase of Sales Over 1905.

But in estimating the real profit in Appellee's gas business, the Court, instead of proceeding upon the sales of 1905, assumes a year beginning May 1, 1906, assumes that the output and profits of Appellee's plants in Manhattan will remain the same as in 1905 ($4,015,475.02), and further assumes an increase in gas acquired from other Companies from the 2,863,702,341 feet of 1905 to 4,000,000,000 cubic feet *(increase 1,131,298,000)*—all to be obtained from the new Astoria plant whose value is fixed at $12,000,000 and whose total capacity would be consumed by said 4,000,000,000 cubic feet. The Court estimated that said 4,000,000,000 feet could be delivered to Complainant at 50 cents per thousand, including "station-cost" of manufacture and a fair return on said investment of $12,000,000, 6 per cent. on that valuation ($720,000) representing 18 cents per thousand on said capacity, and the "station-cost" being reckoned at about 32 cents (*Record*, p. 426).

The computation of the Court on this basis may be summarized as follows:

Receipts from 4,000,000,000 feet at $1 per M. (*Record*, p. 426)		$4,000,000.00
Holder Cost and Return on Capital at 50 cents per M. (*Record*, p. 426)	$2,000,000.00	
Taxes on Astoria Plant, as estimated by the Court (*Record*, p. 426)	90,000.00	
General Expenses, including officers and staff of Astoria Company, Insurance, and other items (*Record*, p. 426), say,	44,282.57	
Total payments to Astoria Company		2,134,282.57
"Apparent" Profit to Appellee (*Record*, p. 432)		$1,865,717.43

Profit on sales of gas of Appellee's own manufacture, as above computed *(ante*, p. 105)----		$4,015,475.02
Appellee's total profit on all gas sold by it, at $1 per M. *(ante*, p. 105)----------		$5,881,192.45
Loss at 20 cents per M. under 80 cent rate, on amount of Appellee's sales for 1905, as above (*ante*, p. 105)-	$2,656,600.00	
Loss at 20 cents per M. under 80 cent rate on 1,000,000,000 feet of such assumed increase in sales of gas acquired from other Companies over such sales in 1905 *(Record*, pp. 408, 428----------	200,000.00	
Total loss under 80 cent rate----------		2,856,600.00
Net profit on total sales of Appellee as stated in Decree *(Record*, p. 430)----------		$3,024,592.45

3. Assignments of Error Respecting said Final Computation.

Appellants assign error in substantially every element of this computation, to wit: to the assumption of such increase in sales, of the increase in cost of gas acquired from other Companies, of change of source of manufacture of some portion of such gas, and in the overlooking of an assumed decrease in expense due to a conjectural reduction in Appellee's "special franchise" tax.

In short, Appellants take the ground that the assumptions of the Court, as to increase of sales and otherwise for the assumed year beginning May 1, 1906, are speculative and legally inadmissible; and that the fixed results for the year 1905 form the proper basis of computation *(Assignment V of Willcox et al. and X of Jackson,—Record*, pp. 437, 482).

We reply that, *if the Court pursued a proper course in adopting the year May 1, 1906 and in assuming said increase of sales therein*, the other Assignments are certainly not well based.

(a) Future Source and Cost of "Purchased" Gas.

Thus, no part of this "purchased" gas, 4,000,000,000 feet, could be expected to come from Appellee's Manhattan plants, since the amount there produced in 1905 (10,419,000,000 feet) substantially exceeded their rated "annual" capacity, which all witnesses stated should be about 200 times their maximum day's capacity of 51,000,000 feet (*Record*, pp. 546, 642, 1511, 1655, 1708, 3792, 4783).

It is in evidence, too (*Record*, pp. 461, 426, 4226, 4292), that the Astoria plant was delivering gas to Appellee in December, 1906—a source from which no gas was received in 1905; and after this plant has been constructed by Appellee at a cost of $12,000,000 to supplement its Manhattan capacity, it would be a violent assumption that it will be allowed to remain idle.

It is likewise inconceivable that the Astoria plant will, in effect, (bookkeeping forms disregarded), deliver its gas to Appellee at the "bare station-cost" of 34.04 cents per thousand (*Record*, pp. 400, 405), at which Appellee apparently received its outside gas in 1905, and thus waive all "return" on the $12,000,000 investment.

Moreover, it is of course true, that upon the view that the price of gas must include a return on the value of the *property employed to produce it*, it is immaterial whether the 4,000,000,000 feet assumed comes from the $12,000,000 plant at Astoria, or from other outside plants in Manhattan of like value.

(b) The Suggested Reduction in Franchise Tax.

Nor is there merit in the suggestion of a possible reduction of the Franchise Tax for 1906 and subsequent years, below the $406,909.23 of 1905 (*Record*, p. 223). Both the Court and Master declined to indulge in such speculation,—the probabilities being directly contrary.

The assessment of Special Franchises for 1905 was $27,300,000. The tentative assessment for 1906, made as of the second Monday

of January, *but to cover the entire year*, was $31,900,000—an increase of $4,600,000 (*Record*, p. 202). The amount is not finally determined until after March 31, prior to which date complaints are heard by the Commissioners.

Under the New York practice, a notice was sent to Appellee in March, 1906—*after the Order of the Gas Commission here in question, reducing the rate for gas to 80 cents had been made* (February 23, 1906), and before this action was begun (May 1, 1906), in order that Appellee might be heard on said assessment before the amount was finally fixed. Appellee appeared and was heard, but said assessment was nevertheless—in spite of the 80 cent rate—permanently fixed by the Tax Board " under Appellee's objection and protest " at $31,900,000 (*Record*, p. 1850); and there is no doubt that it was considered in fixing the assessment.

This experience, coupled with the fact that the assessments of the *identical* Franchises have been raised from $13,950,000 in 1900 (*Record*, p. 6691) to $31,900,000 in 1906 (*Record*, pp. 1848), while the charge for gas has remained stationary at $1, certainly presents no ground upon which a Court might judicially determine that the assessment will be in future reduced in any circumstances.

POINT XIV.

Such "Net Income," $3,024,592.45 (*ante*, p. 6), **for the year beginning May 1, 1906, much higher than legally justifiable.**

In fixing that figure, the Court overlooked various items which must go to reduce it.

1. Initial Error in Tabulation.

The assumed increase in "purchased" gas to 4,000,000,000 feet, involves an increase of 1,136,298,000 feet over 1905 (*Record*, p. 220), but, while including receipts from *sales* of the entire 4,000,000,000 at the $1 rate, the Court deducts the 20 cents per thousand loss due to the 80 cent rate on only 1,000,000,000 feet in excess of the sales of 1905 (*ante, p.* 106–7)—or 136,298,000 feet too little.

The loss on this amount, at 20 cents per M., amounts to $26,259, thereby reducing the "profits" computed by the Court to $2,997,996 (*See Tabulation, post*, p. 118).

2. Omission of "General" and "Distribution" Expense.

While assuming this enormous increase of 1,136,298,000 feet beyond the experience of 1905,—an additional output equal to *more than one-third the entire sales of the City of Boston for that year* (*Record*, pp. 2083–4), and greater than the *entire sales* of all except a very few of the largest Cities in America,—the Court computes no additional expense whatsoever for the handling and distribution thereof. We assert that this cannot be; that if such a vast increase of sales is assumed, the Court must estimate and allow for the increased expense surely attendant.

No witness on either side claimed that such an increase could take place without additional expense; and the action of the Court in omitting any allowance therefor is accordingly not only unsupported by any evidence, but directly in conflict with the evidence of every witness who testified on the subject, as well (we respectfully submit) as with common knowledge on the subject. The only question is as to the *amount* of such additional expense.

(a) Rate of Increase of General and Distribution Expense with Increased Sales.

It was pointed out that an increase in sales usually means the procuring of many smaller consumers, whose patronage is less profitable relatively than the larger customers already on the books (*Record*, p. 4361).

Appellee's experience in this regard is in evidence. It appears that while the consumption of gas *per meter*, in 1885, was 36,000 feet on total sales of less than 4,000,000,000 cubic feet, at a charge of $1.70 per thousand, the consumption per meter in 1905, with sales of 13,283,164,000 feet, at a price of only $1 per thousand, was only 34,000 cubic feet (*Record*, p. 5040).

Vice-President Carter testified respecting the existing situation:

> "The Company is losing large units of business, and taking on a number of small units of business, which cannot fail to increase the cost per thousand of distribution, as well as decrease the average sales per meter in use" (*Record*, p. 4426).

Mr. Forstall showed that this was the common experience; that after a "certain point" is reached, the increase in sales is bound to come from smaller consumers who are relatively more expensive than the larger ones (*Record*, pp. 4361–2).

Mr. Cowdrey, head of the Laclede Gas Light Company of St. Louis, said in Chicago, in speaking of cost of gas production:

> "Increasing the number of consumers to each mile of mains does not materially cheapen the cost of gas. This is especially true after reaching a certain point (*Record*, p. 2589).

And Dr. Humphreys showed that in the City of London, whose *per capita* consumption is highest next to New York of any City in the world (*Record*, p. 4728), the distribution and general expenses of the three metropolitan Companies are showing constant increase *per unit* of increased output. Indeed, from 1901 to 1905, while sales had increased 3.79 per cent., the items of "distribution" and "management" had increased 18.8 per cent., or nearly five times as fast (*Record*, pp. 4728–9).

It is obvious that substantial additional output requires the installation of more appliances, the reading of more recording dials, the indexing and repair of many more meters, the maintenance of more services, the increase of bookkeeping due to the accounts of additional consumers, the employment of additional collectors, an increase in the taxes which are laid upon the "gross earnings" of the Company (*"Tax Law" of New York*, § 186)—in short a *very general* increased activity with necessary attendant expense. Appellee's force in 1905 was presumably sufficient only to meet its requirements at that time; none of Appellants' witnesses indicate any point at which it had idle employees, or its pay-roll could be cut.

(b) A Demonstration From Appellee's Experience.

The data accumulated by the Stevens Committee of the New York Legislature (*Senate Document 30 of 1905*), to which we have above referred, shows Appellee's sales, with distribution and general expenses for the year 1901, which is as far back as its examination extended; and a comparison with the like items for 1905, *strikingly confirms the foregoing conclusions as to rate of increase in such expenses with increased sales.*

Arthur W. Teele, expert accountant of that Committee, found Appellee's "Distributing" and "General Expense", and sales, for the year 1901 (*New York Senate Document 30 of 1905*, pp. 2560-2), which were as follows (*Record*, p. 83):

Distributing	$1,408,258.38
General expense	950,032.28
Total	$2,358,290.66

Sales, 10,296,955,761 cubic feet.

The similar items, with sales, for 1905, appear as follows:

Distributing and General Expense, as found by the Court, in two items aggregating (*Record*, p. 400)	$4,396,741.33
Deductions by the Court, items from $94,506.29 to $841,034.74 inclusive (*Record*, 404-5), aggregating	$1,053,685.42

Less item restored by Court (*Record*, p. 423)	$10,405.00	$1,043,280.42
Allowed by the Court (25.25c. per M.)		$3,353,460.91
Allowed by Court ("Eleven Cent Fund") for "Repairs and Renewals" (*Record*, p. 405)	$1,172,359.10	
Actual Expenditures for "Repairs and Renewals" (*Record*, p. 5080)	$974,289.65	
Allowed by Court beyond actual expenditure for 1905		198,069.45
Actual expenditures for "Distributing" and "General Expense" in 1905		$3,155,391.46

Sales 13,283,163,000 cubic feet. (*Record*, p. 220).

The above amount of $198,069.45 is deducted from the "Distributing" and "General Expense" allowed for 1905 by the Court, since an examination of Mr. Teele's testimony discloses that his figures deal only with actual expenditures, and include *no allowance to bring the average of repairs and renewals for any one year up to the average for a period, or other "reserve" maryin which is commonly conceded to be necessary;* so that a fair comparison requires the reduction of the Court's computation for 1905 to the same basis.

Comparing the foregoing results, for the years 1901 and 1905 (*Record*, p. 5039), we have:

	Sales in feet	Distributing and General Expense	Cost per Thousand
1905	13,283,163,000	$3,155,391	23.75c.
1901	10,296,955,000	2,358,290	22.41c.
	2,986,208,000	$ 797,101	26.69c.

It appears, therefore, that the increase of sales from 1901 to 1905, 2,986,208,000 feet, which closely approximates the amount (2,863,702,341 feet) of sales derived by Appellee in 1905 from subsidiary Companies (*Record, p. 220*), was accompanied by an increased expense of $797,101, which is equal to 26.69 cents per thousand feet of such increased sales. This strikingly

illustrates the proposition that an increase in volume of sales *beyond "a certain point"* is attended by a *disproportionately* large increase in such expense. This is the more convincing since, *during the entire period in question* (1901–1905), the "Agency Agreements" were in operation under which Appellee was receiving from outside Companies a large portion of the gas which it sold *(Record*, pp. 5047, 5049, 5050).

This covers the period of an extraordinary increase in sales due to the great coal strike of 1902–3, which compelled the substitution of gas for other fuel to a large extent *(Record*, pp. 1991–2), and should accordingly be an extreme test on the point under discussion.

It is idle for Appellants, in the face of such evidence, to point to this item and that item in "Distribution" and "General Expense," and argue that *it* will not increase on account of increased sales. While some items do not increase proportionately, others increase more than proportionately, so that the net result according to experience, is that when a Company pushes its sales beyond a "certain point," which Appellee has obviously reached, the *entire* expense beyond the holder *increases—as it is now doing in New York and as it has done in London—at a more rapid ratio than sales.*

And certainly the added receipts resulting from the assumption of such a vast increase in sales cannot be charged against Appellee, with no deduction for the expense which will inevitably accompany their distribution.

(c) Conclusion.

The Court below should, therefore, have reduced its estimate of Appellee's probable profit, by the amount of "General" and "Distribution" Expense attendant on the assumed increased output of 1,136,298,000 feet, at a rate not less than that found by the Court for 1905 (25.25 cents per M.). This would amount to *$286,915 (See Tabulation, post*, p. 118).

3. Omission of Return on Additional Plant Required.

Nor did the Court compute or make any allowance for a return on such increased investment in distributing system and apparatus, as will inevitably accompany the handling and delivery of such an enormous volume of gas as 1,136,298,000 feet.

Again, no witness questions that such increase must occur; it is only a question of amount of increase.

Not only are meters, meter cocks and connections, services and similar property bound to increase, but as consumption per meter decreases on the whole with increased output (*Record*, p. 5040), they must increase more than proportionately with sales. Additional or larger mains, too, may be required; and additional holders will certainly be needed to handle such a vast increase in volume of gas, and this will require the use of *additional real estate as well.*

We know of no better basis of estimating the increase of distributing plant required, than a *pro rata* basis. Appellee's investment in distributing system and apparatus, as found by the Court, *excluding real estate, plants and half of working capital* (*ante*, p. 6), is computed to be $19,538,000 for the distribution of 13,283,000,000 feet; and on this basis, the investment required in distributing plant to handle the additional output of 1,136,298,000 feet would be $1,670,358,—6 per cent. upon which would amount to *$100,221.* This looks small, and undoubtedly is too small, especially as no increase in land for holders is reckoned; but it is not a negligible sum (*See Tabulation, post*, p. 118).

Ratio of Distributing Plant Increase.

Prof. Bemis, for the Appellants, advanced certain theories as to profits from increased sales, and illustrated his point by statistics of certain Massachusetts Cities; but it was shown on rebuttal that in those very Cities the "*gas assets increased more rapidly than the gas profits*" (*Record*, pp. 4722–3).

So, too, it was suggested that many classes of Appellee's assets have not increased since 1884 in proportion to increase of output; but this is due largely to the fact that, in 1884, the plants of the six consolidating Companies were, in the aggregate, of a much greater capacity than the output at that time, there being land enough on hand for a maximum daily capacity of about 50,000,000 cubic feet per day (*Record*, p. 6464), almost the present capacity of Appellee's plants (51,000,000 cubic feet); while, with the addition in 1884 of only $1,000,000, the entire system could have been brought to a capacity of 33,000,000 feet per day (*Record*, p. 6464),—far beyond any demand at that time (*Record*, pp. 1714, 6364, 6464).

But when a Company's output is straining the capacity of its distributing system,—and the Appellant, The City of New York, assigns error in that the Court below "*did not find that the distributing system as now existing is inadequate for the output of Complainant*" (*City's* "*One Hundred and Seventh*" *Assignment, Record*, p. 475)—the situation is distinctly different.

Counsel for the Public Service Commission computed, in his Brief below, that the increase in Appellee's distributing assets in 1905 over 1904 "would not exceed $200,000," accompanying an increase in output of only 112,404,000 feet within the same period (*Record*, p. 5039). With an increase of 1,136,298,000 cubic feet as assumed by the Court, Appellee's estimate of additional investment in "Distributing Plant" at $1,670,358 appears conservative by comparison.

4. If the Court Excludes Expenditures of 1905 As Not Recurring in 1906, it Must Consistently Include Items of 1906 Not Occurring in 1905.

Appellee's operating expense of 1905, was reduced by the Court by the following items, among others (*ante*, p. 104):

"Interest on taxes for the year 1905"	$94,506.29
"Legislative Investigation Expense"	25,671.74
"Franchise Tax Litigation Expense"	63,401.65
Amounting in the aggregate to	$183,579.68

The propriety of these charges in the 1905 account is conceded by the Court (*Record*, p. 401). They were excluded as *temporary and not likely to recur in subsequent years.*

As a matter of fact, the investigation of the Gas Commission was not completed and its Order entered until February 23d, 1906; this suit has been in progress since May, 1906; and while the validity of the Franchise Tax of 1899 has been settled by this Court, taxes since are in litigation in view of the fact that the State has progressively increased the assessment of the identical Franchises from $13,950,000 in 1899 to $31,900,000 for the year 1906,—all of which appears in the Record (*Record*, pp. 6691-6718), but was apparently overlooked by the Court.

It is suggested, therefore, that the Court *was not justified* in *excluding* these, or equivalent, items as a probable expense in 1906 when the last Act attacked took effect; for every evidence indicates that such items of expense are continuing, and are likely to continue, for a considerable time to come.

But if the Court is to exclude these items on the ground that they will not recur in 1906, it must consistently include items which are shown to have occurred in 1906 but did not appear in 1905.

The rule must work both ways; otherwise the computation is one sided and could not fail to work injustice.

Thus it was shown that in the year *1906*, additional taxes were laid over those of 1905 to the extent of 1.13 cents per thousand feet (*Record*, pp. 1667-8), and that wages increased to extent of 1.40 cents per thousand feet, of Appellee's *total sales* (*Record*, p. 4224), and the Master has so found (*Record*, p. 228). This would amount to *$336,059;* and must be included, we submit, if the Court looks to the year 1906 to exclude the items first mentioned.

5. Summary.

It is submitted, therefore, that the computation of the Court, for the year May 1, 1906, should be substantially readjusted and corrected, and the following basis is suggested as a legitimate and fair one:

Net Profits as computed by the Court (*ante*, p. 107).....		$3,024,592.45
Deduct:		
Loss, at 80 cent rate, on 136,298,000 feet (*ante*, p. 114).....	$ 26,259	
General and Distribution Expenses on 1,136,298,000 feet (*ante*, p. 110).....	286,915	
Return on additional distributing plant required (*ante*, p. 115).....	100,221	
Additional Taxes and Wages in 1906 over 1905 (*ante*, p. 117).....	336,059	
		749,454.00
Actual Net Profits for year in question.		$2,275,138.45

Deductions of the foregoing character, we contend, must *as a matter of law be made*, if the Court assumes an increase of 1,136,298,000 feet of sales over 1905; and the amount of such deductions is based upon Appellee's own experience, than which no better criterion can be found.

If, however, Appellee's experience were not considered conclusive, then it is submitted that the Court, by some other method, should have determined the amount of the additional expense to be allowed.

POINT XV.

Normal Profit of Appellee, on the Basis of Known Sales and Expense of year 1905, favored by Public Service Commission, also much less than said $3,024,592 found by the Court for the later year.

The Appellants, objecting to the Court's computation based on the year beginning May 1, 1906 on the ground that it is "speculative", assert that the results of 1905,—for which sales, income and operating expenses are fixed and certain,—are the proper basis for deduction.

The Court, as seen *(ante, p.* 105), has found $3,224,592.45 to be the apparent profit for 1905, with the statement (in effect) that **this was not a "normal profit,"** since in that computation there has not been deducted a "*reasonable recompense or return upon the value of the investment required to produce the gas*" received in that year from other Companies *(Record*, p. 432).

It was not difficult to compute a "reasonable recompense or return," and thereupon to determine a "normal profit" for Appellee.

1. Based on Return on Value of the Astoria Unit.

(a) If, looking to the future source, as the Court has done, we regard the amount of 3,000,000,000 feet of gas acquired by Appellee from other Companies, as normally to be produced at the Astoria plant, we have a recognized valuation of $12,000,000,—a 6 per cent. return upon which calls for $720,000.

It is proper and necessary to include the entire valuation; for the Master has found that the maximum day's capacity at Astoria is only 20,000,000 feet, that the maximum day's sales of Appellee, in 1905, exceeded its own producing capacity by 19,000,000 feet, exclusive of any reserve capacity which should be at least 20% in excess of its sales for safe operation, and accordingly that—

"The amount of gas to be produced by the first Unit of the Astoria plant is *under*, rather than over, what was actually required in addition to Complainant's own output to meet the reasonable demands of its business *in 1905*" (*Record*, p. 185).

Judge HOUGH, referring to the construction of the Astoria plant, remarked that the situation existing was "such as reasonably to justify this provision, entirely apart from the necessity of a reserve" (*Record*, p. 407).

Indeed, as before shown, Appellee's deficiency in actual producing capacity at any one time (as distinguished from the aggregate theoretical capacity of all its plants) below maximum day's sales, was much more than 20,000,000 (*ante*, pp. 85, 94).

(b) Moreover, to make the computation just, we must either include in Appellee's operating expense the items of "interest on taxes," "legislative investigation expense" and "franchise tax litigation expense," aggregating, in 1905, $183,579.68, excluded by the Court as not likely to recur, or in lieu thereof the items of additional taxes and wages in 1906, which did not occur in 1905, amounting to $336,059, as hereinbefore set forth (*ante*, p. 117). Perhaps it is fairer in this connection to include the smaller amount, because it has been suggested that the Court's reason for excluding it was not well founded (*ante*, pp. 116-7), and also because we are at this point specially considering Appellee's operating expense in 1905.

(c) The computation of "normal profit" for 1905 may, therefore be stated, as follows:

Apparent profit, as stated by the Court (*ante*, p. 105)		$3,224,592.45
Deduct: Return on value of Astoria property to produce acquired gas (*Record*, p. 426)	$720,000.00	
Items of Tax Interest and Legislative and Franchise Tax Expense excluded for 1905 on the assumption that they would not recur in 1906 (*ante*, p. 107)	$183,579.68	903,579.68
"Normal" profit for 1905		$2,321,012.77

2. Based on Value of Plants Actually Producing Acquired Gas in 1905.

If we consider the plants of other Companies actually employed to produce the 3,000,000,000 feet of sales manufactured in 1905 outside Appellee's own plants, the computation is not changed.

For the evidence indicates, and the Master has distinctly and repeatedly found (*ante*, p. 91), that the value of the Astoria plant ($12,000,000) is also a fair valuation of the "property of other Companies employed in the production of gas delivered by them to Complainant" in 1905 (*Record*, pp. 186, 254), and this finding is confirmed by the Decree (*Record*, p. 430).

3. Based on a Smaller Capacity than 20,000,000 Feet per Maximum Day.

While the Master and Court thus found, upon undisputed facts that an outside capacity equal to that of the Astoria Unit (20,000,000 feet) was required, on the basis of Appellee's sales in 1905, the valuation of that Unit, or of the equivalent "property of other Companies" actually delivering gas to Appellee in 1905,—could be *pro rated*, were it believed that Appellee's output of 1905 did not require so great a capacity outside its own plants.

(a) Thus if, *allowing for no reserve*, we were to take the proportion of the entire plant (19/20), which Appellee's maximum day requirements from outside Companies (19,000,000 feet according to the Master—*Record*, p. 290), bore to the *maximum day's* capacity of the Astoria plant (20,000,000 feet), the return at 6 per cent. thereon would be reduced from $720,000 to $684,000, and "the normal profit" for 1905, as above computed (*ante*, p. 120), would be increased to $2,357,012.77.

(b) And even if, still allowing for no reserve, we were to take the proportion (practically $\frac{3}{4}$), which Appellee's actual sales of gas required from other Companies in 1905 (about 3,000,000,000 feet) bore

to the entire *annual* capacity of Astoria plant, the interest at 6 per cent. thereon would be reduced from $720,000 to $540,000, and said "normal profit" for 1905 (*ante*, p. 120) would be increased to $2,501,012.77.

NOTE. The so-called "annual" capacity of a plant is merely an estimated annual output, based on the consideration that a plant cannot and will not be run at its maximum "daily" capacity throughout the entire year; but that during some part of the year it will be shut down in whole or in part for repairs and other contingencies, and during the summer months the daily call upon it will be far short of its maximum daily capacity. This "annual" capacity is estimated, according to all the engineers who testified, at 200 times the maximum daily capacity of the plant (*Record*, pp. 546, 642, 1511, 1655, 1708).

The fact that the "annual" capacity of the Astoria plant as thus computed is 4,000,000,000 cubic feet, while Appellee required only 3,000,000,000 cubic feet outside its own works in 1905, will not mislead; for it is the *maximum day's* capacity as compared with *maximum day's sales* which governs. If Appellee's maximum day's sales in 1905 had been 72,000,000 feet instead of 70,000,000 feet, so that its requirement above the maximum daily capacity of its own plants had been 21,000,000 feet instead of 19,000,000 feet, the Astoria Unit would have been *insufficient* to meet the demand, although Appellee's *annual* "aggregate" requirements outside its works might have proven to be less than 4,000,000,000 or even 3,000,000,000 cubic feet.

Admission of Appellants' Witness Marks.

Appellants' expert witness on this subject, Mr. Marks, *flatly accepted and asserted the principle for which Appellee here contends.* He admitted that a return on the value of the property of other Companies employed in producing the gas delivered by them must be included in the cost of gas sold by Appellee, and that it made no difference whether such capacity was located at Astoria or at other plants in Manhattan (*Record*, p. 2787); he computed the value of such a plant at $5,097,000; and *he added this amount to Appellee's own assets* to find the total upon which a return must be computed (*Record*, p. 1940).

As before noted *(ante,* p. 95), this computation was "inadequate" as the Master found (*Record,* p. 186), but **a return at 6% on even this valuation would amount to more than $300,000.**

POINT XVI.

Basis of Appellants' Opposition to Inclusion in Cost of Gas, of a Return on the Property of Subsidiary Companies, Employed in Production of Gas Delivered to Appellee.

Appellants, in spite of their original position as evidenced by the testimony and admissions of their witness Marks, now object to the inclusion in Appellee's charge for gas of any return upon the value of either the Astoria plant, or of the plants of other Companies producing the gas actually delivered to Appellee in 1905.

In effect, they would *compel* delivery of gas by Appellee to its customers, at a rate which would include a return on property producing only 10,419,461,426 feet, out of the 13,283,000,000 feet actually sold by Appellee in that year; and they rest their entire contention upon the terms and effect of certain "Agency Agreements" under which, *in the emergency existing pending the completion of the Astoria plant,* the New Amsterdam, Standard, Mutual and Central Union Companies delivered to Appellee said 3,000,000,000 feet.

1. The "Agency Agreements."

Such "Agency Agreements," a sample of which is quoted by the Master *(Record,* p. 184), provided for the delivery by said subsidiary Companies to Appellee of said gas at *bare cost of labor and materials employed by the producing Company, plus about 10 per*

cent.; and the amount paid to the subsidiary Companies by the Appellee thereunder, in 1905, was $997,039.89, of which $893,432.49 represented cost of labor and materials, and the balance of $103,607.40 was said 10 per cent. (*Record*, pp. 184, 400, 407).

It will be noted at the outset that Appellee owned practically all of the Stock of the New Amsterdam Company (over 99 per cent.), which delivered *more than 70 per cent.* of the entire 3,000,000,000 feet (*City's Ex. 36, Original paging*, 7756), while the New Amsterdam in turn owned all the Stock of the Central Union Company (*p. 453*); and that Appellee also owned about *92* per cent. of the Stock of the Standard Company, and a majority of the Stock of the Mutual Company.

NOTE—It is stated by Counsel for the Public Service Commission (p. 109), that the New Amsterdam Plant had by the expenditure of over One Million Dollars been enabled to supply Appellee with 2,173,196,400 feet per annum; but, of course, this is not all the expenditure necessary for the production of such gas. It was merely an additional expenditure, supplementing the extensive plant already existing. It has, moreover, been pointed out that the aggregate *sales* of Appellee and its subsidiary Companies were so close to their full *capacity*, that the immediate construction of the Astoria Plant was imperative (*ante*, pp. 94–5).

2. No "Return on Investment" to Subsidiary Companies.

If said $103,000 had been "profit" to the producing Companies in any sense, and available for application as "return on capital," it would have represented only about *8/10 of one per cent. on the value of the Astoria plant*, or (in the alternative) on the value found by the Master for the "property of other Companies" producing the 3,000,000,000 feet of gas for Appellee in 1905 (*Master's Report, Record*, pp. 185–6, 254); while even upon the sum of $5,097,000 *which Appellants' expert Marks concedes to be the value of such "property* of the other Companies," it would mean only 2 per cent.!

The Court was, therefore, fully justified in its conclusion stated in the Decree that said sum

> " did not include any reasonable recompense or return upon the value of the investment required to produce said gas " *(Record*, p. 432).

3. No " Profit " to Subsidiary Companies.

But said $103,000 was not "profit" to the producing Companies; *it was obviously more than consumed by items of expense outside labor and material*, such as Taxes, Insurance, Depreciation and Administrative Expenses necessarily attendant on a plant necessary to produce and deliver such an immense volume of gas—a volume substantially as great as the entire sales of gas in the City of Boston in 1905 *(Record*, pp. 2083–4), and approaching the *aggregate output* of the six constituent Companies at the time of their consolidation to form Appellee in 1884 *(Record*, p. 5039).

Thus, *depreciation* beyond " ordinary repairs " was fixed by Appellants' expert, Professor Bemis, at a minimum of 2% *(Record*, pp. 2485–6) on depreciable plant and this, upon depreciable property of only $8,000,000, which is less than the value of such property in the Astoria plant *(Master's Report, Record*, p. 182), would amount to $160,000; while, applied even to the inadequate estimate of Appellants' other expert (Marks) of the value of the "property of other Companies" producing said 3,000,000,000 feet in 1905 ($5,097,000), it *would consume practically the entire $103,000*, without considering Taxes and Insurance and Administrative Expenses in general.

The Court concluded that *Taxes* alone on the Astoria plant would amount to $90,000, and plus Administrative Expenses would amount to $134,000, on the Astoria plant *(Record*, p. 426); and, at that, the Court assumed a tax assessment of only $6,000,000 on Astoria, since the tax rate was about 1.50 *(Record*, p. 1002).

It is obvious, therefore, that not a dollar of real " profit " was included in said $997,000 paid by Appellee to the subsidiary Companies in 1905.

And the Court, recognizing this, characterized the payment as "bare station-cost" *(Record*, p. 400).

4. Contention of Appellants.

Notwithstanding this situation, clear and indisputable upon the Record, Appellants contend that the charge of Appellee for gas, in the present and future, is irrevocably bound by the amount paid to the subsidiary Companies under these temporary (and now expired) emergency agreements; which in effect, would compel Appellee to continue to sell at a price which will afford no return on its $12,000,000 investment in the Astoria plant, or any equivalent plant, from which it is now procuring gas.

POINT XVII.

Property "Employed" in the Public Service, the True Basis for Return.

Appellants overlook what we conceive to be the true principle, sanctioned by this Court in many cases. "The basis of all calculations as to the reasonableness of rates" is, as we construe the decisions, the fair value of the property being "*used*" for the "convenience of the public" *(Smyth v. Ames, 169 U. S. 466, 546; San Diego Land Co. v. National City, 174 U. S. 739, 757; Cotting v. Kansas City Stock Yards, 183 U. S. 79, 89).*

The basis of calculation is not the value of the property "owned" by the corporation delivering the service or the product, but the property which is "employed" for the public convenience; and this includes all the property which the corporation, by *direct ownership or lease or other arrangement, necessarily and reasonably*

employs or procures to be employed, in performing the service or procuring or delivering the product.

> NOTE. It will be observed that the "Agency Agreements" in this case, provide as to each subsidiary Company that it shall "*employ* in such manufacture, production and delivery its own plant and appliances," (*Record*, p. 5049).

1. Value, Not Amount Paid, Controlling.

(a) If Appellee holds a piece of real estate under lease, the reasonable return upon the *value* of such real estate is allowed to Appellee in its operating cost of gas. It may be called "rental", but it is "return" upon the value of the land; and if Appellee pay an exorbitant rental, the fair rental and *not the rental paid*, will be the measure of the allowance for the use of such land, in computing a proper charge for gas.

On the other hand, if Appellee be in possession of lands leased fifty years ago, at a fair rental on the then value thereof, it—as the owner of an estate in lands—would be entitled to include the leasehold in its assets employed in the gas business, and receive a return upon it based upon the *present value* of the land.

(b) No more is Appellee or the State, concluded by the amount which Appellee pays or agrees to pay to subsidiary Companies for gas acquired,—than they (or either of them) are concluded as to value of land owned by the cost thereof, or of land leased by the amount of rental paid therefor.

Had the amount agreed to be paid by Appellee for the gas delivered to it by other Companies been excessive, as representing more than the cost of the production thereof *plus* a proper return on the property employed in producing and delivering it, *the amount would certainly be subject to reduction by the Court;* and if it be too little, computed on the same basis, Appellee is as surely entitled to the benefit of a computation which shall include such fair return, and the consumer is in no wise injured by that procedure.

(c) The question as to gas purchased by Appellee, as well as land used by it, is (in such legislation as now involved) not what it *costs*

Appellee, but what it is *worth ;* and that means the expense of production plus a fair return on the property producing it. If the manufacturer takes payment therefor in any other way than by acceptance of such amount, or chooses as a temporary and accommodatory measure to let Appellee have gas at "bare station-cost" or *gratis*, that is no concern to the consumer and is not controlling in the determination of the "*reasonable* price" for gas delivered to or by Appellee.

2. The Fair Rule.

In short, we take it to be axiomatic that a fair return upon the value of all the property required and employed to produce the gas delivered by a public service corporation to its consumers, *must be paid by such consumers ;* and *how this profit is distributed among the various parties or agencies who own or employ such property, is a matter wholly between them, with which neither the consumer nor the general public has any concern.*

The consumer cannot evade this proper payment by seizing upon a peculiar and special situation such as prevailed temporarily between Appellee and its subsidiary Companies pending the completion of the Astoria plant, any more than he could take advantage of the situation if he found such Companies temporarily delivering to Appellee gas gratuitously. **One may voluntarily sacrifice his property, but no legislature can compel him to do so by rate fixing or otherwise.**

If this were not the true principle, it would have been possible for the Legislature to seize the situation existing when Appellee and other Companies in New York were engaged in the "gas war" eight or ten years ago, and were selling gas to consumers at 50 or 60 cents per thousand,—less than enough to cover cost of production, to say nothing of return on capital,—and to enact a valid Statute compelling the continuance of that low rate, on the ground

that the actual selling price of gas, and not the "reasonable price" as above defined, was controlling as to the power of the Legislature, to fix future rates.

The only rule surely working justice to the consumer and to the producer alike, is that including in the cost of gas a fair return upon the value of all the property reasonably and necessarily employed in the production and distribution of the product; and that, we submit, is the true rule in construing such Acts as are here in question.

3. The Theory of a "Surplus Product."

Thus falls the suggestion that the "Agency Agreements" may have given to the subsidiary Companies an opportunity to dispose of their "*surplus product*" *at a* "*profit.*"

(a) But it seems to have been overlooked that said Companies have no "surplus product" unless they make it; and that they cannot make it without proportionate manufacturing plant and land for that purpose.

For every hundred million feet of additional output, a Company is obliged to establish so many additional units of producing apparatus in the shape of generators, purifiers, condensers and scrubbers, which cover just so much more ground, and are *in exact proportion per thousand of capacity to the same apparatus thus supplemented.*

And again it requires just so much more material (oil and coal, as illustration) and labor *pro rata*, to produce each extra million feet of gas from this additional apparatus. Thus, it takes about one ton of gas-coal to produce each 10,000 feet of coal-gas, and about five gallons of oil to produce each 1,000 feet of water-gas, whether we produce in the aggregate a *million* or a *billion* feet (*Record*, pp. 1734, 4301).

In fact, as elsewhere said, it is conceded by Appellants' witness that after plants have reached a maximum annual capacity of say 700,000,000 cubic feet (and all the subsidiary Companies delivering

gas to Appellee have surpassed that), there is substantially no economy in greater production (*Record*, pp. 1509, 2417).

If a gas Company were like a mineral spring, from which the product runs continuously without expense or effort, the theory of a "surplus product" might be more plausibly advanced.

(b) If the New Amsterdam Company has a maximum daily demand for 15,000,000 cubic feet of gas from its own customers, and also delivers 15,000,000 cubic feet to Appellee, thus employing its total capacity of 30,000,000 cubic feet, it is clearly using one-half its plant for the benefit of Appellee and its consumers. It would be idle to speak of its delivering such 15,000,000 cubic feet to Appellee to get rid of a "surplus product, which it would not possess unless it made it *for that very purpose.*

The very thought that, *as a business proposition*, Companies are delivering to Appellee 3,000,000,000 feet of gas at "*bare station cost*,"—with no "profit" or return on capital included,—is too repugnant to ordinary experience to justify discussion.

A Remarkable Argument.

Realizing, perhaps, the weakness of the argument as to "surplus product," Counsel for the Public Service Commission advanced in the Circuit Court a proposition so remarkable that (to avoid chance of inaccuracy) we quote his Brief :

> "It must be remembered that this eighty-cent gas litigation includes a suit against the State by *each one* of the sub-companies, as well as the present suit. Profits which the Complainant makes on the purchased gas by reason of the agency agreements, are profits which the sub-companies fail to make. **If their appropriation by Complainant makes it harder for Complainant to escape the eighty-cent gas law, by just so much that appropriation makes it easier for the sub-companies to escape.**"

This suggestion well illustrates the situation into which the acceptance of the theory would lead. If, in the case above

assumed, the New Amsterdam Gas Company's total manufacturing plant be of the value of $18,000,000, one-half of which is employed in producing the gas delivered to Appellee at "station cost" with no return on capital, and the other half is employed in producing the gas delivered by the New Amsterdam to its own consumers, the New Amsterdam Company (on Counsel's theory) will be entitled to charge *to the consumers of its own gas* a return on the *entire $18,000,000 of plant value*, which might raise the selling price to them to $1.20 per thousand; and on the other hand, *Appellee's* customers are to get their gas at a figure which includes a return on *Appellee's own* plants, but no return on the $9,000,000 of New Amsterdam property which produced a great part of it, thereby reducing the price of gas to Appellee's customers (at the expense of the New Amsterdam's customers, of course) to perhaps 90 cents!

How would such a proposition be received by the Circuit Court, upon the trial of the New Amsterdam case? Would the proposition be seriously advanced by Counsel in that case? Would not Counsel object to saddling upon the consumers of the New Amsterdam gas, a return upon one-half the plant used exclusively for the benefit of Appellee and its consumers; and strenuously claim that the New Amsterdam should be allowed to compute the return which it may charge against its own consumers, only upon the reasonable capacity (including reserve) which *their* requirements justified it in maintaining?

We submit that these questions answer themselves; and if they do answer themselves, it is obvious that *no consumers of any gas will pay a return on the value of that portion of the New Amsterdam plant* (as typical) *producing the gas delivered by it to Appellee, unless it be the customers of Appellee who consumed that gas.* And if such return is ever to be allowed, *it must be allowed now and in this suit.*

POINT XVIII.

Appellee's Investment In Subsidiary Companies, from which it received Gas in 1905 at "Bare Station-Cost."

While, therefore, it is Appellee's contention that, if, as an emergency accommodation, gas had been delivered to it as a pure gratuity, such a condition could not be presumed to be permanent, and a compulsory rate for gas could not be sustained which would exclude a fair and normal return on the capital producing it; nevertheless, *in view of the theory of Appellants* that the legal price of gas should include only amounts which Appellee was actually "out of pocket" in procuring gas in 1905 from subsidiary Companies, it may be appropriate to point out the fallacy of their assumption that Appellee and its stockholders were actually "out of pocket" no other or greater amounts than the $997,000 *paid directly to producing Companies.*

1. Appellee's Control of Producing Companies.

Appellee, as above noted, owns a majority of the Stock of each of the four subsidiary Companies (New Amsterdam, Standard, Central Union and Mutual), which delivered to it gas at "station-cost" in 1905; and of two (New Amsterdam and Central Union) it owns over 99%, and of one (Standard) above 92%.

It may also be noted that the Stock of these Companies was acquired by the issue of Appellee's own Stock in and after July, 1900; and all thereof was issued at $150 and upwards per share (*Record*, pp. 154, 848–9).

1. The Court says, referring to the acquisition of gas by Appellee from said Companies (*Record*, p. 406):

> "The three billion feet purchased in 1905, were obtained from Companies all but one of which are almost as completely dominated by Complainant as is The Astoria Light,

> Heat & Power Company; and in that one, it owns a majority of the Stock. *It has used that control or ownership to obtain gas at about holder cost plus ten per cent*".

It is impossible to suppose that these Companies would have delivered to Appellee such an amount of gas with no return on the investment employed, *had not Appellee so controlled them that any payment to said Companies representing a return on the value of the plant producing such gas, would have come (practically all) back to Appellee as the owner of their Stock.* The conclusion is so legitimate and inevitable, that it requires no argument to emphasize it.

2. "Bookkeeping" Treatment Not Controlling.

Had Appellee paid to such subsidiary Companies station-cost, *plus* a return on the investment producing the 3,000,000,000 feet, and thereupon received back in dividends the whole or any part of the amount paid as such "return", Appellants would not have questioned the propriety of including such "return" in computing the proper charge for gas sold by Appellee; and exactly the same point is reached if Appellee pays to the subsidiary Companies "*station-cost*" *alone*, neither paying such "return" to them nor receiving it back in dividends.

Again, if Appellee as the owner of all the Stock and obligations of the Astoria Company, which it received in exchange for $12,000,000 in cash raised by issue of Appellee's obligations, were to receive gas from the Astoria plant as a matter of bookkeeping at "bare station-cost", would it not be necessary in fixing the charge which Appellee might legally make to consumers, either to include said $12,000,000 of Debentures in Appellee's capital upon which it might earn a return, or to add to the station-cost of the Astoria gas a return (say at least 6%) on the value of the Astoria plant? And would it make any difference in law (**a**) whether Appellee paid to the Astoria Company the return ($720,000) on the

value of the Astoria plant in addition to the station-cost of said gas, this amount being thereupon paid back by the Astoria Company to Appellee as dividends or interest and applied by Appellee to pay the 6% due on the $12,000,000 of its own obligations outstanding, or (**b**) whether the $720,000 was not thus sent about the circle, and Appellee paid for said gas only station-cost and then paid directly the interest on its Debentures ?

Is the principle in any way different where Appellee owns somewhat short of the entire capital of a Company, as in the case of the four subsidiary Companies above named, which delivered to it gas in 1905? And is its right to a return on its investment therein, by virtue of which it obtained this gas (as the Court repeatedly recognizes) at "bare station-cost" (*Record*, pp. 400, 406), to be governed by a method of "bookkeeping" instead of by the substance and effect of the transaction?

3. The Circuit Court's Reservation.

It was pointed out by the Court in the Decree (*Record*, p. 432) that the $59,831,435 of assets found by the Court as the valuation of "Complainant's property actually employed in its business of manufacturing and supplying gas" did not include—

> "*the amount of Complainant's investment in the securities of other gas Companies*, from which Companies it was obtaining a large part of the gas which it delivered to its customers, *nor the value of the property of such other Companies* or any part thereof employed in the production and delivery to Complainant of such gas."

That the Court, as well as the Master, considered Appellee to be entitled to a return upon one or the other, to be computed either as return on its own capital or in the cost of gas delivered to it, is quite clear from the Court's action in including in such cost a return on the value of the Astoria plant, which it considered to be the proper source of supply hereafter.

Appellants, however, utterly ignore Appellee's investment and decline to admit that Appellee is entitled "in a charge for gas" to include a return, either on its investment in such other Companies or on the value of the plants producing the acquired gas.

4. Conclusion.

And unless the Court either (**a**) adds, *in some form*, to Appellee's own assets the value of the plant of outside Companies employed in producing gas for Appellee in 1905, representing the value of the property employed in the public service, as was done by the Master, or (**b**) includes in *cost to Appellee* of such gas a return upon the value of such plant, as was done by the Court, Appellee and its stockholders are denied any return on the entire investment (whether at Astoria or in other Companies in Manhattan from which gas is procured), which, as the Circuit Court clearly indicates (*Record*, p. 406), alone made it possible for Appellee to obtain gas from them at a bookkeeping charge covering only "station-cost".

There is, of course, no difference in principle whether the money for such investment was advanced by Appellee's *stockholders* or was financed by Appellee's Debentures, or whether Appellee's ownership of such plant be direct or indirect, or whether the dividends on Appellee's Stock or interest on its Debentures be derived (in so far as this investment is concerned) from net operating earnings, or from income from securities owned. It all comes to the same point,—that Appellee's *stockholders* would be in either case *out of pocket* the interest on the investment which made possible the procuring of gas from other Companies at station-cost.

POINT XIX.

Item "Contingent Expense (Includes Renewals)" $1,328,316.37—being Item 67 of Exhibit 94—allowed in whole by the Master, but only in part by the Court, as an operating charge in 1905.—No Fund for "ultimate disintegration" allowed.

The Attorney General, as bearing upon the propriety of adopting the present valuation of mains as distinguished from original cost, and also upon the proper rate of return on investment, asserts *(Brief, p. 101)* that—

> "Complainant has demanded and the Court has allowed, a large amount on account of depreciation of Complainant's depreciated property including mains, out of which they *are to be restored* (to wit, 11c. per thousand cubic feet)"—

and again, under the heading "Depreciation Should Have Estimated on the Whole Property" *(Brief, p. 176-7)*, suggests that there has been allowed to Appellee by the Court—

> "as an operating charge, a sum to provide for the *final* renewal of its plant—to conserve its plant against *ultimate* disintegration through natural wear and tear."

The Attorney General's assumptions in this regard are wholly erroneous. Instead of an allowance having been made to Appellee sufficient to provide for "*final*" (in the sense of *future*) renewal or "*ultimate disintegration*" of its plant, or any fund out of which mains (or any other property) "*are to be*" restored, the allowance actually made is insufficient to cover the *average actual expenditure* of Appellee for *current* "*upkeep*," as an examination of the Record will show.

A. Nature of 10c. Item, and Finding of Master.

Appellee's operating expenses for the year 1905, as shown by its books of accounts, and Exhibit 94 abstracted therefrom, include an item called "*Contingent Expense (includes Renewals)*," computed at 10c. per thousand cubic feet of Appellee's sales, amounting to $1,328,000.

This item of expense was thus intended to provide (**a**) for "*renewals*" of apparatus lost or worn out in any year (it will be observed that in the operating cost of gas—Exhibit 94—"*repairs*" are covered in various other items, but *no* "*renewals or replacements,*" as the Decree recognizes—*Record*, p. 431); and it was also to cover, as the Master states, (**b**) an

> "allowance sufficient to bring the amount chargeable for *current repairs and renewals* for the year 1905, *up to the average of the Company's past experience*, and also of (**c**) a sufficient reserve fund to cover *final renewals and contingencies*" (*Record*, p. 253).

The cost of gas to Appellee as found by the Master, 65.84c. per thousand feet, included the "Contingent Expense" item referred to *without deduction;* the Master saying, after a most painstaking and careful consideration of the subject, to which we specially invite the attention of the Court (*Record*, pp. 224-238):

> "*I am satisfied* that the charge of 10 cents per thousand feet for "contingent expenses" *including renewals and replacements*, as shown by Item 67, is not excessive but, on the other hand *rather conservative*" (*Record*, p. 238).

Indeed, the testimony clearly established the fact, as Appellee believes, that this amount was required to meet (1) Appellee's *expenditures* for renewals during the year 1905, (2) to make up the *difference* between its expenditures for "Repairs and renewals" in 1905 and the average expenditures for the preceding twenty years, and (3) for *additional expenses* which *actually accrued in the year 1906* before the completion of the hearing. Thus—

(a) Actual Renewals and Replacements.

It was shown that the actual "Renewals" of property for the year 1905 were $282,219.67, or **2.12c. per thousand** cubic feet of gas sold (*Record*, p. 224).

This sum represented property actually worn out, lost and gone from Appellee's property account. It merely recorded what *had already happened in the year 1905*,—loss that had occurred "during the year" (*Master's Report, Record* p. 226). *It was in no way an allowance for future loss or abandonment.*

> In the case of "Plant," "Mains," "Services" and "Meters," which are the most important classes of Appellee's property, the individual items lost from them respectively, in 1905, appeared in Appellee's books and the amount was exactly stated (*Master's Report, Record*, p. 225). Thus, in "Mains" each item of pipe abandoned or removed, with its length, size and location, is entered in Appellee's books (*Record*, pp. 3861–3863).
>
> The other property items (*Record*, p. 226) are largely composed of many small individual parts or pieces; and accordingly the loss is stated in a percentage established by the experience of the Company, which is *none the less a practically exact amount and represents property value actually lost during the year in question.* It would be useless bookkeeping to attempt to define each piece of harness and each tool or implement disappearing from use.

(b) Amount to be Added, to "Average" 1905 with Appellee's Experience.

It also appeared that the amount *spent* by Appellee for "Repairs and Renewals" combined, in 1905, was only $974,289.65, or 7.34c. per thousand cubic feet sold (*State's Ex. L, Record*, p. 5080).

But the average expenditure for "Repairs and Renewals" for the twenty years preceding 1905, was 10.89c. per thousand feet sold (*Record*, p. 5079)—the amount spent in different years varying from 7 to 16 cents or over (*Record*, pp. 5078–80); and the difference, re-

quired to bring Appellee's allowance for "Repairs and renewals" in 1905 up to said average, was **3.55c. per thousand feet** sold (*Record*, p. 253).

The necessity of adopting an "average" amount for "Repairs and renewals", in computing normal operating cost in any one year, was—in view of the wide fluctuations of those items—universally recognized and conceded.

As the Master says—

> "A Company may in one year abandon, or suffer damage to, considerable quantities of apparatus with the result of placing the repairs and renewals for that year at a very high figure, whereas in the following year there may be a minimum of loss and the repairs and renewals be much less" (*Record*, p. 229),

and at a later page (*Record*, p. 253)—

> "*It is * * * the fact that the propriety of an allowance sufficient to bring the amount expended for current repairs and renewals for any one year up to the average covering a period of years, is fully established by the evidence.*"

(c) "Contingencies" Met in 1906.

Moreover, before the year 1906 had passed, three more items of expense materialized as found by the Master (*Record*, p. 228), the first estimated and the other two certain, as follows:

Additional cost of enrichment in order to maintain for a full year the standard of candle power provided by the statutes in question, the 22-candle power penalty having applied to only half the year 1905, whose operating cost was before the Master	1.83c.	
Increased taxes over the year 1906	1.13c.	
Increased cost of labor over the year 1906	1.40c.	
		4.36c.

B. Summary.

(a) Summarized, the situation, which in the view of Appellee justified the inclusion by the Master of the contingent expense item to the full amount of 10c., was as follows:

Actual cost of Renewals and Replacements in 1905		2.12c.
The difference between the average cost of *Current* "Repairs and Renewals" for twenty years	10.89c.	
and the cost of "Repairs and Renewals" in the year 1905	7.34c.	3.55c.
Allowance for Current Expenditures		5.67c.
Additional cost of Enrichment for 1906	1.83c.	
Increase in Taxes—for 1906	1.13c.	
Increase in Labor— " "	1.40c.	4.36c.
Total		10.03c.

Thus is consumed the entire 10 cents and a trifle over.

(b) Or, presented possibly in a clearer way, the computation appears as follows:

Expended for "Repairs" as shown in State's Exhibit L (*Record*, p. 5080), $692,069.98, equalling, on Appellee's total sales	5.22c.
Ten-cent item "Contingent expense (includes renewals)"	10.00c.
Total of said two items	15.22c.
Average for "Repairs and Renewals" (*ante*, p. 138)	10.89c.
Balance	4.33c.

(c) Thus it appears that after allowing for repairs and renewals in operating cost of 1905, and an amount equal *only to average annual expenditures for repairs and renewals* for the Company's experience, there was left but 4.33c. of said 10-cent item; which, as above seen, was more than consumed by the three items of enrichment, taxes and labor, 4.36c., *all occurring as early as 1906*, as found

by the *Master* (*Record*, p. 228); and all of which, *except 1.8c.* would be consumed, even if we exclude from consideration the enrichment item (1.83c.), which the Court thought not sufficiently sustained by the evidence (*Record*, p. 424).

And this leaves nothing (or at most only 1.8c.) for "future" renewals or "contingencies."

C. Allowance by the Court less than Admission of Appellants.

Not only did Counsel for the Attorney General and the State Gas Commission introduce State's Exhibit L (*Record*, pp. 5078–80) showing in detail Appellee's expenditure for repairs and renewals from the beginning of business in 1884, and the average to be 10.89c. per thousand sold; and request the Master to find—as the Master did find—

> "That the Complainant *has expended* on account of repairs and renewals for the twenty years preceding 1905, an average of *10.89 cents per 1,000 cubic feet*" (*Record*, p. 276)—

but we find the following concession in the Attorney General's Brief (p. 194) in this Court:

> **"We concede to Complainant for the purpose of this memorandum an allowance of 10.89c. per thousand cubic feet to cover repairs and cover renewals, current and final."**

1. Indeed, the findings of the Master, and the concession of the Attorney General to that effect, are supported by overwhelming, if not unanimous, testimony—even excluding Appellee's witnesses who all supported them.

> (**a**) The New York State Gas Commission, in the investigation resulting in the Order of February 23rd, 1906, which is here in issue, included in said computation not only the

amount actually spent in repairs and renewals for the year examined by them, but also—in their own words—

> "*an additional sum sufficient to bring the expenditures for repairs and replacements to the average expenditure by the Company for twenty years for those items*" (*Record*, p. 32).

(**b**) Appellants' own expert, Professor Bemis, likewise allowed in his computation of Appellee's operating cost for 1905, *both before the Gas Commission and in this suit*, an additional amount sufficient to bring the repairs and renewals for the year under consideration up to the twenty year average of 10.89c. per thousand feet of gas sold (*Record*, pp. 2346, 2496).

(**c**) The Chicago Committee, in their recent investigation of gas operations there, likewise added about 4c. to the expenditures for renewals for the year which they examined, to bring the "repairs and renewals" for the year up to a normal figure which they found to be the fair average there—10 cents (*Record*, p. 2573).

And Professor Bemis, after *there* accepting 10.16c. for "Renewals and Repairs", *and allowing 3c. per thousand feet as a "reserve" fund* in addition, said (*Record*, p. 2706)—

> "It must be remembered that exclusively water-gas plants like that of Chicago *do not require as large repairs and renewals as do the mixed coal-and water-gas plants of New York.*"

2. The following computation shows the amount thus conceded by Appellants as compared with the amount allowed by the Court:

Average annual expenditure for "Repairs and renewals" conceded by Appellants as properly chargeable, to wit: 10.89c. on 13,283,000,000 feet of gas sold in 1905 (our multiplication)	$1,446,536.45
Allowance by the Court on account of "Repairs and Renewals" (*Record*, p. 405)	1,172,359.10
Allowed by the Court, below amount conceded by Appellants	$ 274,177.35

That is to say, the allowance by the Court for "Repairs and Renewals" was nearly $275,000 less than conceded by said Appellant; and a simple computation shows that the allowance by the Court was only *8.88c. per thousand*, although the actual average expenditure by Appellee for repairs and renewals even in the last eleven years of its experience, *during a great part of which there appeared in its operating cost no allowance for renewals attendant upon the production of the billions of feet of gas obtained from subsidiary Companies*, was *9.73c. per thousand* feet of total sales *(Master's Report, Record*, p. 229).

D. The Ground of Action of the Court.

This result came about, from the Court's mistakenly applying the accepted unit of 10.89c. (the Court took the round figure of 11c.) to the gas *of Appellee's make only*, 10,657,810,000 feet, on the theory that the distribution of the 2,929,210,000 feet of gas derived from other Companies *(Exhibit 94, Record*, p. 220), *had contributed nothing to the requirement for repairs and renewals* in Appellee's distributing system.

This may be gathered from the following statement of the Court below (*Record*, p. 400) :

> "It appears, however, that it would have cost substantially as much to distribute the ten and one-half billion feet which Complainant made as it did to distribute the thirteen and a half billion feet sold during the period of inquiry; it entailed no measureable expense to pass the additional three million feet through holders, mains and services."

—in other words, that Appellee's *gross expenses* ought to be no greater under sales of 13,500,000,000 feet, than when its business amounted to only 10,500,000,000—a theory so startling as to command attention, but elsewhere shown to be wholly unsound *(ante*, pp. 110-4).

But it seems to have been overlooked that, even if the theory were sound, the fact would remain that the expenditure for "Re-

pairs and renewals", as shown in State's Exhibit L, *averaged, 10.89c. on Appellee's total sales;* and a computation of the requirement for "repairs and renewals" for any one year on *any other basis* could not possibly bring a just result or provide the amount required for average expenditures of this character.

3. In short it is most respectfully suggested that the learned Court below failed—in the limited time at its disposal and with such a great record to consider,—to grasp clearly the facts and the principles applicable in the situation.

(**a**) Thus it speaks of the repair items of Exhibit 94, aggregating $685,077.47 (*Record*, p. 402) as "Repairs *and Renewals* of 1905, stated in Station and Distribution Cost" (*Record*, p. 405); whereas examination of Exhibit 94 shows that they are "*Repairs*" *alone*, no renewals being covered except in the "10 cent item" in question.

(**b**) Again, it refers to the item "Contingent expense (includes renewals)" as a "*ten per cent. reserve*" (*Record*, p. 403); whereas, as above pointed out, over $282,219 thereof represents actual losses in 1905, and all but 4.33 cents thereof was consumed by *average actual expenditure* from year to year, without laying aside any "reserve" or "ultimate disintegration fund";—and the Court did not allow even such *average expenditure*. And, moreover, said 4.33c. would have been all or substantially all consumed within the next year by actual additional expenses (*ante*, p. 139).

(**c**) And again referring to the expenditure in "construction" account of the sum of $282,219, to offset and make good said property loss of $282,219 in 1905, it said (*Record*, p. 403):

> "The distinction between depreciation of that kind and new construction seems to me very shadowy"—

apparently overlooking the fact that every expenditure in "upkeep" of property—*whether it represents a new bolt and*

is classed as a repair, or a new boiler in place of a worn out one and is called a "renewal" or "replacement"—is "new construction" in the sense that it is new material; but is nevertheless chargeable to operating expense *to the extent of the loss which it makes good.* The Master was entirely clear on this point *(Master's Report, Record,* pp. 224–7).

(d) And also, referring to the sum of $783,561.36, unexpended in 1905, the Court remarks *(Record,* p. 403) that such sum repeated for twenty years would "produce a fund sufficient to reconstruct Appellee's entire plant", apparently overlooking the fact that the depreciable property of Appellee as found by the Court represents about $35,000,000 of value (*Record,* p. 432), so that instead of "twenty years" the period for the reconstruction of Appellee's entire plant affected by "depreciation" would be over 45 years; and also the fact that the greater part of said $783,561.36 is consumed by the 3.55c. above conceded to equalize Appellee's expenditures for "Repairs and renewals" for 1905 with the Company's average current expenditures for these purposes, and therefore could not represent a "*reserve*" fund for "ultimate disintegration," or scrapping.

(e) Nor can it be said that "the business of selling gas purchased was proportionately far more profitable than that of selling gas of the vendor's own manufacture" *(Record,* p. 400), *except as this may be made to appear by denial of any return on the property of subsidiary Companies manufacturing such gas,* and the attributing of the *entire distribution* and *general expense* to Appellee's own gas, as was done on the erroneous theory above pointed out *(ante,* p. 105*a*).

Dr. Humphreys' Testimony.

Counsel for the Public Service Commission devotes much space to an analysis of the views of Dr. Humphreys on the subject of "depreciation," and to a computation as to what would have resulted if the Doctor's theory had been accepted by the Court (*Brief*, pp. 113–123). It is not necessary to traverse Counsel's argument, in view of the fact that the point is academic. Dr. Humphreys favored a fund amounting to 14.145c. per thousand feet "for repairs, renewals and depreciation," and in addition "a reserve to cover contingencies" of 5c. (*Master's Report*, p. 233); but the Court allowed only 8.88c. to cover everything (*ante*, p. 143).

E. Appellee's Total Expenditures for "Repairs and Renewals," since Organization.

Appellants refer to the total amount expended by Appellee for "Repairs and Renewals" from its organization to 1905 *inclusive*, $17,392,512.68, as a very large sum; but they overlook the fact that it had relation to **sales reaching the enormous amount of about one hundred and sixty-four billion cubic feet** (*Record*, p. 5039); and that in proportion to sales such expenditures are only a fraction over 10 cents per thousand,—a rate considered by Appellant's own witnesses as moderate.

Erroneous Basis for Estimating "Repair and Renewal" Requirements.

It is suggested that the true method for calculation in determining the amount required for "Repairs and Renewals," is by taking, not the percentage per M. of sales, but the proportion which repairs and replacements for each of several five year periods, bore to the total property of the Company which is subject to repair and replacement (*Brief for Public Service Commission*, p. 251). And Counsel points out that the proportion is nearly constant at three and a fraction per cent. for each five year period examined, beginning with 1890–1894.

This is plausible, but not sound in practice. The amount of "repairs and renewals" required, depends not alone on the amount of depreciable property, *but very largely upon the amount and severity of use of the property.*

Hence, during the last five year period taken, 1900–1904, when Appellee was making and distributing more gas than ever before and working its plants to the utmost, the percentage of wear and tear should have *exceeded* the earlier period, 1890–4. That it apparently did not, requires an explanation; and it is found in the fact that Appellee's accounts do not include any expenditure for replacements in *the property of the subsidiary Companies, which were employed in the production of nearly twenty-five per cent. of the gas which Appellee had been in the last period distributing.*

The best criterion as to the amount of "*use*" of a gas system, is the amount of gas that it puts out; and hence a certain number of "cents per M." on each thousand, as determined by average experience, is the most safe and accurate guide for "repairs and renewals."

Counsel for the Appellant is not, we assume, experienced in the gas business, and it might fairly be presumed, that *when all the practical witnesses on both sides of this case* unite in estimating in "cents per M."—they are following a rule which experience has taught to be the most reliable.

F. The Expressions of this Court on "Depreciation" Charges.

As we understand the expressions of this Court, they have recognised the value to the public, as well as to the Company concerned, of a not too constricted allowance for maintenance, depreciation and contingencies,—even in the case of a Public Service Corporation.

The position is thus stated by this Court in *Union Pacific Railway Company vs. U. S.* (99 U. S., 35, 421–2):

> "We think that the true interest of the government in this case is the same as that of the stockholders; and will be subserved by *encouraging a liberal application of the earnings to the improvement of the works.*"

And in this connection attention may be called to the fact that the Interstate Commerce Commission, and other Public Service Commissions, doubtless following what they understand to be sound policy approved by the courts, *require* the corporations under their jurisdictions to set up an appropriate "liability depreciation account" for each of their several classes of depreciable property, including an amount for "accrued depreciation"; and to charge into said account *monthly* the amount of such depreciation, which thereby becomes an item in "operating expense."

In the present case Mr. Mayer found depreciation in Appellee's plants of over $604,000, which amount he deducted in his valuation; but this $604,000 is nowhere covered unless a "depreciation" or "reserve" account be allowed to Appellee (*Master's Report*, p. 227).

G. The Institution of the Account not an "After-Thought."

It has been suggested in this Court, as it was suggested to the Master, that the institution of this special 10c. account to cover contingencies and "renewals," was an afterthought, due to the investigation of the Stevens Committee in April and May, 1905.

As the Master says (*Master's Report*, *Record*, p. 228):

> "If the account in question is in itself a proper one, the fact that it was not opened until 1905 has little bearing upon the issues now to be determined."

But the Record clearly shows that the suggestion is wholly baseless.

(a) The opening of such an account was discussed by the officers *in 1904* (*Record*, pp. 1665-6), the Vice-President of the Company *testified in Boston* that such an allowance of 10 cents was required (*Record*, p. 1656), and it had been *agreed among the officers* of the Company that an account of this general character should be

opened (*Record*, pp. 1665–6),—**all before the appointment of the Stevens Committee,** which was not made until March, 1905 (*Record*, p. 1673).

Indeed, the only detail which was left undecided before the appointment of said Committee, was the amount to be required by this account, *it being argued by some officers that 10 cents would prove to be inadequate* to cover actual expenditures for renewals and other items above enumerated (*Record*, p. 1666), as it has in fact proved to be. It was finally decided in May, 1905, to limit it to 10c., and it was entered in the books for *each month*,—dating back to January, 1905, so as to cover the fiscal year.

(**b**) The opening of this definite "10-cent" account did not in fact alter the practice of the Company at all. Theretofore it charged the cost of property *actually and currently lost*, to a "depreciation" account, and *carried unexpended allowances* (whether to make good such *current* loss or provide for *future* loss, *in its general "profit and loss" surplus account*. There was just as much money on hand, and just as much protection afforded by that method; and the present method was introduced merely for greater definiteness, transferring to the special 10-cent account items and allowances which had been theretofore carried *for the very same purposes* in profit and loss "surplus."

(**c**) Appellee, in its segregation of said "10 cent item," from its "profit and loss," account, adopted the practice *required* by the Interstate Commerce Commission, and New York Public Service Commission, above pointed out (*ante*, p. 148).

H. Erroneous Assertion as to Increase of Property From Earnings, and as to Cost of Increase in Capacity.

Counsel for the Public Service Commission, in discussing depreciation (*Brief*, p. 119), says:

> "The total of the new construction, together with all additions to real and personal property up to October 31st, 1906, amounted to $9,693,595.90 (Complainant's Exhibit 79, p. 5032). The amount contributed towards this expense by

*new capital cannot have been more than $3,929,371.82 (*p. 23, *supra).* Hence *current net earnings must have contributed at least $5,764,224.08,* over and above all current and final renewals found necessary for the first 21 years of the Company's existence. *The $9,693,595.50 increased the manufacturing output to two and a half times that of 1884 and increased the distributing capacity to an extent enabling Complainant to more than quadruple its sales.*"

Nothing could be farther from the facts.

(a) We have already pointed out (*ante*, p. 23) the complete inaccuracy of the assertion that the entire amount of "New capital" of Appellee introduced in its gas business since 1884 was $3,929,371.82. Consequently the argument that "current net earnings must have contributed at least $5,764,224.08" to said sum of $9,693,595.90 falls with it (*ante*, p. 23); and all computations involving the erroneous figures are valueless.

Nor did any part of the said sum of $17,392,512.68, charged for "repairs and renewals" since 1884, go for anything but "upkeep" of property; not a dollar thereof was spent to increase the investment. The line was rigidly drawn, as explicitly testified (*Record*, pp. 4446–7).

(b) Nor is there any better foundation for the suggestion that said $9,693,565.90 "increased the manufacturing output to two and one half times that of 1884"; and "increased the distributing capacity to the extent of enabling the Appellee to more than quadruple its sales."

As elsewhere said, Appellee's system, in 1884, had in every direction *a capacity far beyond its sales* (*Record*, pp. 1714, 5039). It had land sufficient for a capacity of 50,000,000 cubic feet per day, or practically equal to its present capacity of 51,000,000 feet; while by the expenditure of only a million dollars, its manufacturing plant could have been brought up to a capacity of 33,000,000 feet (*Record*, p. 6464), many items being already up to that capacity.

The $9,693,565.90 by no means, therefore, increased capacity, either at works or in distribution system, as assumed.

PART FIFTH.

The Rate of Eighty Cents per thousand as related to Other Companies in the City of New York; Comparison of gas charges, or operating expense, as between different Companies; the Question of Pressure; and the Investigations of the Legislative Committee in 1905 and Gas Commission in 1905-6.

POINT XX.

The Rate of Eighty Cents per Thousand Feet, as Related to other Companies in the City of New York.

Appellants complain that the Record does not contain sufficient evidence

> "to show that the rate of eighty cents per thousand cubic feet * * * does not afford a fair and reasonable return to the [*other*] *Companies* doing business in the said City," the evidence being limited to the valuation of property and operations of the Complainant alone; and further that the record does not show but that the said rate would afford a fair and reasonable return upon the value of property employed in the making and distribution of gas by a Company in same territory with the Complainant, well located and equipped and economically managed, but that the case was decided on the theory that if the statutory maximum price does not afford * * * a sufficient rate of return upon the value of the property employed in its business of making and distributing gas * * * the statute is void as to that Company irrespective of its effect upon other Companies doing business in the same territory" *(Record*, pp. 481, 436).

Why Appellee should be obliged to try in this action, the cases also of the three or four other gas Companies operating in the Borough of Manhattan, to say nothing of the many others operating in the other Boroughs of the City of New York, is not apparent. It might very well be in many cases (although there is nothing in the present record to indicate it to be true here), that a

rate which would permit a just and reasonable return to one gas Company, would under sound legal principles not afford such return to another, even in the same territory; and the theory that all Companies must be fitted to one "Procrustean Bed" (to employ the term of the Court below on the argument), is a novel one.

1. Coal or Water-Gas?

Of the two best known kinds of gas, coal-gas and water-gas, one is manufactured largely from gas-*coal* and the other from gas-*oil* When coal is high, coal-gas may cost the more; and when oil is high, water-gas may be more expensive.

Moreover, the initial cost of a coal-gas plant is much greater than that of a water-gas plant (*Record*, pp. 3747–8), and the amount required to pay a return thereon per unit of capacity, correspondingly greater.

Is it seriously contended that the assets of a coal-gas plant are to be valued on the basis of cost of a water-gas plant of the same capacity, or *vice versa?* And is the ideal "station-cost" of gas to be computed upon the basis of a water-gas production, or a coal-gas production, or a mixed water and coal-gas production such as Appellee's?

2. Uniformity Within What Area?

Again, within what territory must all Companies conform their assets and charges to the "ideal" Company? The City of New York, even the Island of Manhattan alone, comprises a territory greater than that occupied by Troy and Albany, with the territory between the two. Would it be claimed that the capital or expenses of the Troy Company should be irrevocably governed by those of the Albany Company?

Moreover, in the Island of Manhattan, it appears that the Standard and New Amsterdam Companies (whose organization was comparatively recent), and The Mutual Company which is an old one

(*Record*, pp. 527, 4318, 817, 5292), do business wholly in the more congested part of the Island of Manhattan (*Record*, p. 4499), while Appellee has its mains in every opened street in the City, having extended its service to the outlying and sparsely settled sections where consumption per mile of main is the least (*Record*, p. 4499). Must Appellee, thus operating a service of different character, be arbitrarily conformed as to assets and operating expense to the other three Companies, if their assets or cost per thousand should be found to be less than Appellee's?

3. The London Companies.

In London there are three great Companies,—the London Gas Light & Coke, the South Metropolitan, and the Commercial,—and no two of these charge or are required to charge the same rate for gas (*Record*, p. 4741).

The land of one may be more valuable than another, for one reason or another; no two Companies in the nature of things can exactly duplicate each other's advantages, disadvantages and personal equations.

Indeed, it was conceded in this case by the witnesses of both Appellee and Appellants, that no two Companies, even in the same City and under similar conditions, can produce gas at exactly the same cost, a difference of a cent or two between them being not at all unusual or significant (*Record*, p. 4470).

4. Appellee's Five Plants.

It was said below that Appellee had five "scattered plants" instead of one colossal plant; but if that were a disadvantage, it would be a circumstance directly related to the natural and necessary growth of Appellee and its predecessors, in meeting the requirements of the community as pioneer Companies, and would afford no legal ground for confiscation of any part of its properties.

But individual plants of the size of Appellee's, are equally economical with larger plants in production of gas. Professor

Bemis, Appellants' expert, testified that when a plant has an annual capacity of 700,000,000 cubic feet per annum, there is practically no economy in greater production in a single plant (*Record*, p. 2417); and the *smallest* one of Appellee's plants (42nd Street) has a capacity of 4,500,000 cubic feet per maximum day (*Record*, p. 1393), equivalent to an annual capacity far beyond 700,000,000 feet.

Indeed, examining the figures of all Companies operating on the Island of Manhattan, it appears that Appellee's station-cost (about 31 cents per M. for water-gas) is substantially less than that of the old Mutual Company, for the same kind of gas (*Record*, p. 4472); and but a trifle in excess of station-cost to the more recent Standard and New Amsterdam Companies, due to advantages possessed by them which have no relation to efficiency of plant or operation (*Record*, pp. 4472, 4469).

5. Location, Equipment and Management.

There is no finding, nor is there any evidence to support the suggestion, that Appellee was not well located and equipped, or not "economically managed."

(a) Substantially the only criticism on Appellee's operating account, related to the price paid for oil, and the price received for coke and other residuals; and the Master has fuly considered and found directly against Appellants' contentions in that regard (*Record*, pp. 239–40).

The matter of "oil" is briefly discussed under another Point (*post*, p. 160).

Finding of the Master.

The general question of "management" is fully met by the following finding of the Master (*Record*, p. 255):

> "Nor is there any satisfactory evidence that any of the expenditures of Complainant for material, labor, or otherwise, in the manufacture and distribution of gas, have been improper, unnecessary, or unreasonable."

(b) The character of Appellee's "equipment" has been fully discussed, at another point (*ante*, pp. 38–50).

It may be generally observed, however, that the fact that it produced gas at less than the Mutual, and at substantially the same rate as the New Amsterdam and Standard Companies, is of itself significant evidence on the subject; and the finding of the Master *at the request of Appellants (Record*, pp. 276–7), that more than 4/5 of Appellee's capacity is in the shape of "*modern, up-to-date water-gas plants, which could not be improved upon anywhere*," and that the balance of the capacity (coal-gas) is "*efficient and in shape to operate for an indefinite period without impairment*" (*Record*, p. 277), covers the whole ground.

6. General Principles Applicable.

It is respectfully urged that a lighting Company which has made its investment *reasonably and prudently*, cannot be deprived of its property by being compelled to sell its product at a rate which will not allow a "just and reasonable" return upon that property.

If several Companies are allowed to charge a price for gas which will return to each 8 per cent. upon the value of its investment, *reasonably acquired and devoted to the public service*, they have the "equal protection of the law"; whereas if one Company were allowed to charge $1.00 and make 6 per cent. return, while all other Companies were limited to $1.00 but could only make 3 per cent. return, in each case on the *reasonable value of their respective properties prudently produced*, they would be clearly denied such "equal protection".

A Company may be compelled, in self defence, to reduce the return earned on its property to less than a "reasonable one", or may be put entirely out of business, by the discovery of a new process which may result in a great reduction in the cost at which the product can be made and marketed, as compared with the cost to the former Company; but this affords no authority to the *State* to take the property of such original Company *vi et armis* without "just compensation".

If it had been shown that Appellee's property was in excess of the requirements of its business, instead of being insufficient there-

for, or that such property had been extravagantly or imprudently acquired or established, or that the present value thereof was less than the valuation actually placed thereon by the Master, a different situation might arise; but the Master has found (*Record*, p. 254):

> "There is no satisfactory evidence that the cost to Complainant of said property was unreasonable or excessive; or that the cost of production of said property was enhanced through faulty construction or waste; or that the various sums expended from time to time by Complainant or its predecessor Companies in permanent improvements and betterments were not intelligently and properly expended or that any such expenditure was made otherwise than providently and honestly."

Therefore the authorities cited by Appellants, holding that the public may not be compelled to pay a return upon property extravagantly or unreasonably produced or valued, or held in excess of the fair requirements of the business, have no application whatever to the present situation, and it is not considered necessary to distinguish them individually.

Economic laws may do that which the State has no power to do. It may be that a process will be devised by which, in an inexpensive plant and by a newly discovered method, gas may be sold at 25 cents per thousand feet and produce a reasonable return on the value of the investment; but certainly no Legislature would in that event have the power to *compel* every coal- and water-gas plant now operating to sell its product at that rate. The *situation* might force an old Company out of business, but the *State* could not do so by legislative Act directing it to sell its product at less than cost; and if it still found the community, from "love and affection" or other motive, willing to purchase its product at a rate which would produce a reasonable return on its investment, it would be entitled (if possessing continuing franchises) to continue its business and to sell at that rate,—regardless of the fact that the new Company might be profitably selling *its* product at one-fourth the charge, or of any Act of the Legislature attempting to establish that as the maximum price for gas.

POINT XXI.

Comparison of gas charges of different Companies, or elements of operating expense, valueless without adequate data and analysis.

A.

Charge for Gas.

As Mr. Cowdrey, of the Laclede Gas Light Company of St. Louis, said, in the Chicago investigation (*Record*, pp. 2512–16):

> "There are *no two places probably in the United States* where the conditions are the same. * * * The only way that one can get at the proper cost in any particular place is by making a *careful investigation in that particular place*, and by taking *all the conditions* into consideration that exist *there*."

And yet Appellant, The City of New York, calls attention to the "McMillan Companies" operating in—

1. Detroit, Milwaukee and Grand Rapids—

with the remark that they were selling gas at the time of the trial at considerably less than the $1.00 rate charged in New York (*Brief*, p. 64).

Dr. Humphreys, referring to these very Cities, declared that as a general proposition he would not—

> "consider it possible to achieve the same results in New York City as to the cost of gas as can be achieved in the Lake region * * * in which those Cities are located" (*Record*, p. 4704),

continuing—

> "Q. I will ask you whether you think it possible to make any comparison or to draw any deductions as to the price in New York, or the prices charged in those Cities, without a complete analysis of accounts and costs of other items?

"A. It would have to be made with an expert analysis, and when I say 'expert' I mean expert both from the operating standpoint and the accountant's standpoint; an analysis other than that would not be of any special value. We would have to know as to the exact classification of all the items" (*Record*, p. 4704).

If, however, we consider these Cities, upon what pertinent data appears in the *Record*, we find that at the time of the trial their average selling price was 84.95 cents per M. (*Record*, p. 4494):

(**a**) But these are "Lake Cities", where *coal* is *cheaper* and *residuals* are *higher* than in the City of New York (*Record*, p. 4702). A ton of gas-coal produces about ten thousand feet of gas; so that if gas-coal be *even one dollar per ton* cheaper in those Cities than in New York, it would make 10 cents difference in the cost per 1,000 feet of coal-gas (*Marks, Record*, p. 2030).

(**b**) Oil also is cheaper in the Lake Cities, being only 2¾ cents at Cleveland (*Record*, p. 2437), as against an average cost to Appellee of 4.52 cents (*Record*, p. 4205), or about 1.77 cents less. As it requires about five gallons of oil to produce 1,000 feet of water-gas (*Record*, p. 2030), *this item alone* would mean a difference of 8.88 cents in cost of water-gas, on the assumption (which is a fair one) that oil costs the McMillan Companies approximately the same as the Cleveland Company.

(**c**) Moreover it appears that the candle power at the works in those Cities was only 18, as compared with 24 for Complainant (*Record*, pp. 3267, 4583), representing a difference of about 5 cents additional for *candle power alone*.

Cost to Consumers Per Candle Power.

As to consumers of the gas, a simple computation makes it appear that (cost of production ignored), consumers in those Cities were paying *$1.23 per thousand feet* to procure the same illumination (24+ candles) which the New York consumer obtains at $1.00 (*Record*, pp. 4538–9),—in other words, illumination *per unit* was costing those consumers nearly 25% more than consumers in Manhattan.

2. Boston.

Professor Bemis stated that, at the time of the trial, Boston was the *only City in the East* (*i. e.* east of Ohio) where a rate of less than $1.00 was established *by law* (p. 3418).

That City, as is well known, is operating under a recent "sliding scale" Act, which starts with a 7% return on capital with gas at 90 cents, allowing the Company to increase its dividends 1% for each 5 cents reduction in the price per M of gas.

The Company, in trying out this plan, had reduced the price to 85c. at the time of the trial, and possibly has reduced further since; but *it may increase to 90c. at any time* (*Record*, p. 2712).

The situation in Boston, as to cost of production, is, however, peculiarly favorable for the East, and its selling price is no criterion for other Cities.

(**a**) In the first place, the legal candle power in Massachusetts is *16 candles*, as against Appellee's 22. Thus 85 cents in Boston, would therefore mean at least *90 cents*, if adjusted to 22 candle power.

(**b**) Further than this, the Boston Company received over one-half its gas from the New England Gas and Coke Company (a *coke* and not a *gas* Company), *as a by-product*, at *23 cents per thousand feet* (*Record*, p. 2654),—such price being made possible by the fact that said Coke Company was formerly controlled by the same interests which owned the Dominion Coal Company, and had received an exclusive contract for its gas-coal at about *$1.95 alongside in Boston* (*Record*, p. 2509), as against $3.18 per ton paid by Complainant (*Record*, p. 217).

And Professor Bemis necessarily concedes (as is clear enough anyhow), that the cost of the gas sent out by the Boston Company would be higher "*if it did not buy so much in bulk from the New England Gas and Coke Company*" (*Record*, p. 2711).

(**c**) Moreover, it appeared that the earnings of the Boston Company included profits from its electrical and outside gas operations;

and even including these, there was no evidence that the Company was able to earn even five per cent. upon the appraised value of its property, which is greatly in excess of its share capital (*Record*, p. 12).

3. Conclusion.

Without taking space for reference to other Cities mentioned in the Record, it may be generally stated:

(**a**) That in *every one* of the few cases where gas was being sold for less than $1.00, there appeared a difference in the cost of oil or of gas-coal due to the local conditions, or of candle-power maintained, or of both together, which accounted for the lower price.

(**b**) That in *every case* consumers in those Cities were paying more, *per candle-power*, for illumination than consumers pay in Manhattan at $1.00.

(**c**) That no price for gas, prevailing in any City cited justifies a rate in New York of *eighty cents for twenty-two candle-power gas or anything approaching it*; but, on the contrary so far as the prices in other Cities quoted were in anyway of value, *they condemn an eighty cent rate for a 22 candle-power gas as without precedent.*

B.

Price Paid by Appellee for Oil, Compared with Other Companies.

It was stated by Appellant, the City of New York (*Brief*, p. 59), that the Appellee "claims it is required to pay more per gallon to the Standard Oil Company than other Companies in Greater New York," * * * and this increases unnecessarily the apparent cost of gas by about five cents per 1,000 cubic foot.

It should be said at the outset that the citations "(*Record, Exhibit* 94, pp. 2312 and 3674)" *in no way bear out the statement that the "cost of gas"* ("apparent" or otherwise) to Appellee is about "five cents" per thousand more than to other Companies in the City of New York. On the contrary, as hereinbefore pointed out, its station cost *is substantially the same as that of all other Companies operating in Manhattan Island* (*ante*, pp. 40–1).

1. The oil used by Appellee costs from 4.29c. to 4.875c. per gallon (*Record*, p. 239). In their discussion of the subject, Appellants apparently fail to recognize, that "*gas-oil*" is a generic term, including *many grades and qualities;* so that for one "gas oil" a Company may better afford to pay 5 cents, than to pay 3 cents for some inferior grade.

2. Appellants' witness, Marks, quoted from "Brown's Directory" *data* indicating that certain Companies in New York State outside the City paid in 1905, an average of 3.65c. for oil (*Record*, p. 1916). It is obvious that in the absence of *data* as to *quality* these figures convey no argument; and Appellee's Vice-President, from the same authority, showed that the Companies in New York State omitted by Mr. Marks paid from 4.12c. to 7c. per gallon, and a mean of 5.035c. (*Record*, p. 4212).

3. As to the Companies cited by Appellants within the City of New York, as procuring oil at a cheaper price than Appellee, it appears at the outset that each of them consumes an amount of oil which is insignificant as compared with Appellee's requirements (*Record*, p. 4203), and might probably be supplied by any number of individual producers. Thus—

Brooklyn Borough	670,760	gallons per annum:
Kings County	1,395,408	" " "
New York & Richmond	832,405	" " "
Queens Borough	421,346	" " "

while Appellee's contract calls for the delivery of *255,000,000 gallons in two years and eight months (Master's Report, Record*, p. 239).

It is true that the immense requirements of Appellee can be met only from one source. Even Appellants' "independent" oil witness from Ohio was unable to name any other producer which had ever undertaken to fill such an order (*Record*, p. 3263).

And moreover, it was shown that the small outlying Companies cited by Appellants *were using oils of cheaper grade, and in several instances not of a quality able to maintain the minimum of 22-candle power* required by law (*Record*, pp. 4212–44).

4. All the Companies operating on Manhattan Island receive the same grade of oil at the same price as Appellee, except the Mutual; and it appeared that the Mutual, which used a lower grade and paid a less price, had *a higher cost per candle* than Appellee and the other Companies, which used more expensive oil (*Record*, p. 4495).

5. The contentions of Appellants below on the subject of oil were fully met in behalf of Appellee (*Record*, pp. 4203–4215); and the Master, after a review of the evidence, concluded (*Record*, p. 1240):—

> "It would appear further that from the standpoint of economy, the greater efficiency of the higher grade oil more than offsets the difference in its cost per gallon."
>
> "* * * Nor, making due allowance for varying local conditions and differences in grade, is there any satisfactory evidence that the price paid by Complainant is on the whole excessive as compared with that paid by various other Companies to which reference was made."

POINT XXII.

The Question of Pressure.

The Acts in question provide that Appellee shall maintain a pressure in its "service mains" at every point, and at all times, of not less than one inch or more than two and one-half inches; and impose a penalty of $1,000 for each failure in this regard. Service mains obviously mean distribution mains, through which gas is delivered to the "service" pipes of consumers (*Record*, pp. 666, 1619, 1696, 1791); indeed, the term "service mains" is employed by witnesses for the Appellants as synonymous with "distribution mains" (*Record*, p. 2915), and could mean nothing else.

The finding of the Decree on this subject is as follows (*Record*, p. 433):

"The pressure required by said two Acts and the Order aforesaid, is not physically impossible, *if the entire system of gas distribution in the City of New York be reconstructed;* but compliance with such requirement is *commercially impossible under the rates for gas prescribed by said two Acts and Order.*"

1. Evidence as to Possibility of Compliance.

(a) It appeared that differences in elevation alone on Manhattan Island, would account for the entire variation (1.5 inches) allowed (*Record*, pp. 1784, 1623, 1810); but the demands of consumption are so varied and unaccountable, from many different causes, that it was testified that Appellee could not comply with the requirement, even if there were no variations in level to deal with (*Record*, pp. 650, 1779, 4373, 4414).

It was also testified that such modern appliances as Welsbach burners, gas logs and gas ranges required a minimum pressure of at least 2 inches at the burner, which means about 2½ inches at the main, for efficient operation, and that the efficiency is increased by a pressure substantially beyond that (*Record*, pp. 1840, 4020, 4025).

(a) **Chief Engineer Bradley** testified as follows (*Record*, pp. 549–51):

"Q. Is it in your judgment as an expert, physically possible for the Company to comply with this requirement of the Statute? A. *It is absolutely impossible.*

Q. Why do you say that? A. Because of the physical conditions and the action of the gas in the mains over which the Company has no control, the variations of pressure caused by the consumers, opening up and shutting off gas; all this we cannot control.

Q. Do atmospheric conditions affect it? A. Atmospheric conditions affect it, they are apt to interfere with it, and I say further that we cannot control it because I have tried faithfully for over a year to do it and have not succeeded.

Q. Did you mention variations in elevation? A. Variations in elevation, of course they have their effect (p. 549). * * *

Q. At the intersections of the streets, how are the mains arranged for the purpose of equalizing pressure? A. *The mains are connected together at the cross-streets by running through what is technically termed a cross into the main.* That is, with four openings, and the gas mains are simply common; they are all commonly connected.

Q. Does the effect of that tend to equalize the pressure? A. Yes, only for that we could not supply the gas.

Q. You have had charge of the pressure of the gas have you not? A. Yes.

Q. Ever since you became Chief Engineer? A. Yes, ever since I became Chief Engineer.

Q. And have you maintained any greater pressure than has been necessary to supply the demands of consumers? A. No, sir.

Q. Has not the complaint been the other way, that the pressure has not been sufficiently great to supply the demands? * * * A. I have known of complaints, hundreds of complaints, from consumers that they did *not get gas enough*, and we always try to supply them (p. 550). * * *

Q. Suppose you should never exceed the pressure of two and a half inches; what would be the effect of that? A. I would not like to say what the effect would be. There would be an absolute loss of business; we would get out of business.

Q. I mean would there be sufficient pressure in that case to supply the consumer? A. *No, sir; we could not supply the consumer; absolutely no.*

Q. Would there be any danger to life from that cause? A. Yes, if we should reduce the pressure to that point, at no point in the mains to more than two and a half inches, there would be a great many other points where there would be absolutely no pressure at all, and, *the burners being opened, the supply would come on again, and it would probably result in the death of a great many people*" (p. 551).

(b) Vice-President Addicks (Acting President), a graduate of the United States Naval Academy at Annapolis and Chief Engineer for a considerable time of the Boston Companies (*Record*, pp. 1561-2) testified as follows (*Record*, p. 1563):

"Q. I will ask you, based on your knowledge as an engineer, and particularly in the gas business, whether it is possible in your judgment to observe those requirements and furnish your customers with gas in the City of New York? * * * A. My judgment is that it is *practically impossible to conform to the requirements of that law as to pressure.*"

(c) **Dr. Alexander C. Humphreys,** President of Stevens Institute of Technology, whose experience as a gas engineer is undoubtedly unequalled in this country (*Record*, p. 1681–3), on having his attention called to the pressure requirement of the Statutes, testified (*Record*, p. 1683–4):

"Q. What is your view as to the possibility of complying with that provision? A. *Practically impossible.*"

The foregoing opinions denied the ability of the Company to comply with the law, *as a general proposition and without limitation to the present condition of the system.*

(d) **Mr. Marks,** Appellants' original witness on the subject, admitted that, under the existing conditions and connections of the mains of the Consolidated Gas Company, it was impossible to comply with the law, and testified additionally (*Record*, pp. 1985, 2786–7):

"Q. Now, did you also say that it is to the interest of gas Companies to keep their pressures in their mains just as low as possible, in order to avoid a great loss by breakage [obviously error for "leakage"—Ed.] and excessive use of gas in street lighting? A. I did.

Q. That is true, isn't it? A. It is true. (*Record*, p. 1985).

* * * * * *

Q. And in connection with the cost of gas as well as pressure did you state that while you considered it mechanically possible by isolating the gas mains of the Island of Manhattan according to their levels, *and feeding each level by means of a separate feed main or mains,* with the use of governors to come within the limitations of the law of June 3, 1905, *it did not appear to you to be*

necessary, and that any such attempt as this would be found to be commercially expensive and technically very troublesome in operation, without giving any return in real advantage or economical results to consumers (page 48 of affidavit)? A. I did.

"Q. And of course if it is commercially expensive and fully possible to be done, the expense, so far as return on capital necessary to accomplish it is concerned, or the expense of operation of the system when installed, would be a charge against the consumers of gas to be reckoned with in fixing the price at which that gas could be sold? That is a fair proposition, isn't it? A. It is so" (*Record*, pp. 2786-7).

(e) And **Mr. Edgerton**, Appellants' own witness on the general subject, while not pretending that compliance with the requirements of the statute was possible in the existing situation, advanced the following plan as a remedy (*Record*, pp. 3461-2):

"Q. In what way should the gas be delivered to the mains from which services are taken off at a more uniform pressure than it is now? A. The system would involve a few **high pressure mains** running up to 15 or 20 pounds or to such a pressure as would not impoverish the gas to any appreciable extent, and *govern the pressure of the gas* into the *service* mains of the Company by means of a **governor** or by means of valves, regulated by hand or a workman if preferred, although the **governor** would be the most equal method and its action could be watched by a watchman at the important points.

Q. Taking into consideration the New York condition, where would you place those high pressure mains? A. **The high pressure mains run on each side of the City,** being made of the largest diameter near the most important and congested districts, and running parallel with the shore, running from the Battery to the Ship Canal. I have estimated on the delivery of 8,000,000 cubic feet per hour under a pressure of 15 pounds in two mains of 24 inches diameter. The mains could be reduced from 24 inches to 20 inches, 16 and 12 inches towards the ends. And from these mains deliver by the **governors** into the larger mains and also into the service mains. There would be no need in this provision of which I speak to lay pipes *across* the City

having any considerable pressure at all. The present piping being so nearly adequate to delivering an equal supply, that governing them into the large cross-mains would be all that is required.

Q. And do you think that those *pressure mains* could be connected with the present system of pipes without great changes in their distributing system? A. It would not require any change at all in the distributing system, only a due regard to the points of introduction of the gas by means of the **governor** and the selecting of a governor of a reliable character to handle the gas."

And Mr. Edgerton subsequently admitted that his proposed pressure of 20 pounds in his "high pressure mains" would, if the "**governor**" at the entrance of the service mains failed to work and allowed the pressure to get through, be sufficient to "blow the meters out," which "would be a pretty serious situation * * * if anything of the kind could happen" (*Record*, p. 3471); and he was unable to name any City where so high a pressure as 20 pounds was used, his most definite suggestion being "New Orleans", where the pressure main runs "**around**" the City (*Record*, p. 3471–2),—not through the congested portions.

(f) Superintendent of Mains Simpson testified on that point (*Record*, pp. 3927-8, 3931):

"Q. Have you been dealing with pressure in mains and seen the effect of the pressure, and of gas escaping from mains under pressure, during the last twenty-five or thirty years? A. I have, yes sir.

Q. What have you to say as to the feasibility of distributing or putting gas through the City of New York under a pressure of twenty or thirty pounds as suggested by Mr. Edgerton? A. *I should be very sorry to have charge of the mains when we had such pressure as that, as he is dealing with.*

Q. Have there been accidents to the mains of the Company which have allowed the escape of gas within recent times? A. A great many accidents to the mains *with the present pressure* we are carrying. * * * The most recent one I recall was on October 13th at Forty-third Street and First Avenue. In that case the Consolidated Telegraph and Electric Subway Company

were laying a subway along one side of our twenty-inch gas mains. They fired an unusually heavy blast, it broke the mains and the gas immediately caught fire and *blazed to the very top of the tenement houses* alongside, and except for the promptness of our men—the watchman we had there was seriously burned and had to be taken away in an ambulance—and we had some men working around the corner a block away, and the Superintendent of the district happened to be crossing First Avenue and saw the blaze from a mile away, and drove right down.

So by a combination of circumstances, being ready, we were able to put the fire out nine minutes after it happened. * * * The pressure on the gas in that main was *two inches or* $\frac{1}{4}$ *part of a pound* Now, the only reason that the block was not put on fire was on account of the prompt work of our men who happened to be there. By the time we had the stoppers in and the gas turned off, the windows of the tenement house alongside and a saloon—the glass was all cracked and ready to break in. In another two minutes the windows would have gone, and the whole place also, and you wouldn't have been able to get near the place. * * * I know in this case here with a pressure of two inches, the matter would have been very serious indeed if our men had not been on the spot and put it out. **If the pressure was twenty pounds, or 560 inches, I don't know what would have happened. * * * I don't believe the firemen themselves could have got within 300 feet of the place, and nothing in the world could have possibly saved that block** " (p. 3927-8).

For Mr. Simpson's further testimony on this point, see *Record*, p. 3931.

We have quoted at considerable length the testimony of the various witnesses, in order that the arrangement of the proposed system, **and the office of the automatic "governors" involved,** might be clear in considering

(a) Appellants' Present Position.

This proposition of Mr. Edgerton, which was advanced and elaborated with so great pains below by Appellants, has been abandoned by them in this court

(*Brief of Attorney General*, pp. 201-7; *Brief of Public Service Commission*, p. 283); and they now apparently rely upon certain testimony of Mr. Bradley, assuming that he therein admits a plan by which the pressure requirements can be met *without the great and prohibitive expense attendant on the Edgerton proposition*. A brief consideration of that assumption shows its utter fallacy. The vital part of Mr. Bradley's testimony is as follows (*Record*, p. 571):

> Q. Now, it is perfectly practicable, is it not, to divide your City *into districts* and place district regulators or **governors** at different places throughout the City? A. Theoretically it is practicable. Practically there are serious objections to it.
>
> Q. Well, what are they practically? A. The defendants are forcing the consumers in a great City like New York to depend upon the automatic action of an **automatic governor** buried somewhere in the street, or an automatic governor situated in the basement or on the first floor of a building. If the City was *districted off* in that way and *each district supplied through a governor*, it would be a matter of very grave doubt whether at times this governor would not fail to operate, like all automatic machinery, and with an important, and I might state a dangerous element, as gas is, it is not wise to introduce any element that adds to the danger. And in my opinion district governors do add to the dangers of interruption and difficulty with gas supply.
>
> Q. Well, are they used in many Cities? A. They are used in many cases. Perhaps where they have more nerve than I have."

This clearly involves the proposition that the City be "districted off," and "each district" be supplied through a "governor," which would separate the distribution mains from the "high pressure mains." It contemplates and requires *a system of precisely the character advocated by Mr. Edgerton*, to wit, a system of "trunk mains," with the City divided into "districts" and a "governor" from such trunk mains, at the point where the gas under such pressure is admitted into each "district." Indeed, the **Attorney General** in his Brief (p. 202) states that Mr. Bradley shows that "the Company could control the pressure" by delivering gas—

"through a trunk main at **high pressure** and by means of a district **governor,** reducing it and delivering it into the service mains within the **district** at any given pressure."

Mr. Edgerton chose to run such "pressure mains" up and down the sides of the City, as *obviously the simplest* and *most economical mode of construction to reach the "districts" which must be established,* instead of running such "mains" through the heart of the City.

Any form of "district" regulation by means of governors involves the installation of independent "trunk mains" from the point of supply, to the point of control. Of course the ordinary "distribution" mains, could not be used as "trunk mains" for this purpose, for the pressure at the entrance to the first district can not exceed 2½ inches.

Any departure from the lines of Edgerton's "high pressure" plan, would simply involve more mileage of "trunk mains," through the more congested parts of the City, and consequently an even greater expenditure.

(b) Important to Be Noted.

It will be observed that Mr. Bradley *in no wise, by statement or implication, modifies his emphatic testimony above quoted (ante,* p. 163) *as to the "absolute impossibility of compliance* with the pressure requirements of the Statute, even if he were assumed to have "nerve" (to use his own word) to install such "high pressure mains" with the "automatic governors" in the City of New York.

It is apparent that such "automatic governors" are employed merely to fix the *initial* pressure at which the gas enters the distribution mains, from the "high pressure" mains; and they have no relation to what happens in the "distribution" mains after the gas has entered them. It has been the contention of Appellee throughout, that the varying demands of consumption within the "district" from moment to moment and

hour to hour, from causes beyond Appellee's control, are such that with an initial pressure of only 2½ inches at the entrance to the district it would be impossible to prevent the pressure at the extremity or some other point in the district from falling at some time below one inch; and Mr. Bradley has stated it as his distinct opinion (*ante*, p. 164), that with an initial pressure of no "more than 2½ inches," the supply of gas might be, at some point in a district, completely exhausted so that lighted burners would expire, and probably "*result in the death of a great many people.*"

In Illustration.

Thus pressure charts were presented by Appellee, showing pressure at different points as related to the pressure at the distributing stations at the same moment (*Complainant's Exs.* 345–8, *Record*, pp. 6043–6046). Such charts proved that, while at *one* point in the district the pressure was *rising*, at *other* points the pressure was at the same moment *falling;* so that any man or governor would be unable to adjust the pressure to follow both.

And in further illustration it appears that, during the trial, the City Engineer having complained that the pressure at the City Water Station was insufficient, pressure gauges were, on December 14th, 1906, placed in said City Station and on a lamp post just outside, and the results of the pressure observations there and at Appellee's 132nd Street Station supplying that point were as follows:

	Page of Record.	Hour.	Inches. Minimum.	Maximum.
In City Station	(*Record*, p. 6059)	6 P.M.	.85 inches	2.35 in. 1 A.M.
On Lamp Post	(*Record*, p. 6054)	6 "	1.3 "	2.9, 12:38 P.M.
Appellee's 132nd Street Station	(*Record*, p. 6055)	5.15 A.M.	1.95 "	6.5 in. 6 P.M.

And it appeared that at 6 o'clock P. M., when the pressure was *lowest* at the City Station (.85 in. inside and 1.3 in. on lamp-post), it was highest at Appellee's station (6.5 inches) (*Complainant's Exs.* 356 and 357, *Record*, pp. 6054–5).

(c) Conditions in Which "High Pressure" Mains are Used.

It should also be noted that the "cases" in which such "high pressure" system is employed are distinctly different from a congested City like New York.

The distinction as to New Orleans has already been pointed out, and the purposes and circumstances existing there and elsewhere for the employment of such a system are defined more at length in other parts of the *Record* (pp. 3930-1; 4704-5). Its common use is well known to be to "deliver gas to *small country towns* through *small* high pressure mains," the pressure being then "*reduced* inside the towns" (*Record*, pp. 3930-1).

And that the system is not in use for the purpose of maintaining any such extraordinary pressure requirements as provided in the present Statute, is apparent from the fact that *in no other City in the world* are such limitations of pressure required (*post*, p. 175), nor have Appellants attempted to show that in any City in the world the pressure is in fact maintained within the limits prescribed in the Statute under consideration.

It is the view of the Appellee that the Court went to an extreme not justified by the evidence, in finding compliance with such pressure regulations to be possible even by a reconstruction of Appellee's "entire system of gas distribution in the City of New York."

This was further than the Master went, whose statement was that it might be possible "to remedy this condition, *at least to some degree*," by establishing districts, with a "district governor" for each,—the Master obviously recognizing that this meant a "high pressure" system, since he states that there is some doubt as to the "*safety* of such governors."

2. Expense of Reconstruction.

The Master, after full consideration of the subject, having found that—

> "Under the distributing system as now existing and in operation it is not possible to fulfill the statutory requirements as to pressure" (*Record*, p. 250)

further finds that the installation of Mr. Edgerton's high-pressure mains would at the outset cost—

> "4,000,000 *for main and valve construction alone*, in addition to which would be required pumping stations and apparatus, the annual charges and operating expense in connection with which Mr. Addicks testified would amount to several cents per thousand feet of gas sold, and would involve a corresponding increase in operating cost or proper selling price of such gas" (*Record*, p. 255).

(a) Mr. Edgerton himself stated the proper location for his high pressure mains (*Record*, pp. 3461, 3473, 3931), and Mr. Simpson showed without contradiction that the cost for main and valve construction alone would be $4,198,425 (*Record*, p. 3930). The streets of New York are now so congested with pipes and other sub-surface structures that laying large mains is a matter of immense expense, and sometimes an impossibility without going to great depths to avoid structures already there (*Record*, pp. 4189, 4174–6, 6025–32); and "high pressure" mains must additionally be of special and powerful construction (*Record*, pp. 3930, 4320).

(b) In addition, Mr. Addicks, after declaring that it would be neither "safe or wise or economical" to instal such a system in the City of New York, stated that there would be other expenditure, to wit (*Record*, p. 4229):

> "Installation of the power plant and pumping machinery necessary to supply the gas to the high pressure main system that Mr. Edgerton has testified to, and unless many of our stations should be wiped out entirely, I don't know whether Mr. Edgerton had any idea of concentrating them at one or two points or not, I do not think it is feasible, and I presume he

did not,—but it would require such plants at our various distributing stations, the larger ones, that would cost a very large fixed charge annually which would run up into *the hundreds of thousands of dollars.* I am in the midst of that investigation now.

"Q. It would amount then to several cents a thousand on the present output of gas? A. Yes, I think so."

In other words, in addition to the return on the $4,198,000 cost for "high pressure main and valve construction," there would be imposed a fixed charge of several "hundreds of thousands of dollars," amounting to "several cents a thousand" feet of sales, on account of the property specified by Mr. Addicks.

(c) *And in addition to this,* it is obvious that in order to establish the independent "districts," it would be necessary to go down under the present expensive pavement at the corner of every street marking the border of each district, *in order to "seal" or cut off the mains at that point* so that the "district" should have no communication with other sections; for, as above noted (*ante,* p. 164), *all the mains are now interlocked at every street intersection.* The expense of this work would, of itself, obviously be enormous, would add a further large sum to capital account, calling for corresponding increase in annual fixed charges therefor.

On the evidence it is difficult to conceive how the Court could have reached any other conclusion than that the aggregate expense would be so great, that compliance with the pressure requirements was—

"Commercially impossible under the rates for gas prescribed in the two acts and order."

3. Period Required for Reconstruction.

Moreover it would be a matter of common knowledge that the reconstruction of the entire system of gas distribution in the City of New York, would not only involve an enormous capital expenditure, but would require so great a time for the work that it would

be physically impossible between the date of the passage and taking effect of the respective Acts requiring it. The first Act was approved June 3, 1905, and took effect July 1, 1905; and the second Act was approved April 3, 1905, and took effect July 1st, 1906.

Indeed, it appeared that it would take "a very considerable time" to instal even the "high pressure" mains (*Record*, p. 1658); and, for a long time, compliance with the Act in question would be impossible in any event.

4. A Unique Law.

No witness was able to name any other City in the world, where a maximum pressure for gas had been established, to say nothing of a maximum pressure so low as 2½ inches (*Record, pp. 1658, 1843*).

It appears that in some English Cities a *minimum* pressure of .6 of an inch to one inch is established, but no maximum (*Record*, p. 1840).

POINT XXIII.

The "Legislative Committee" of 1905, and the Gas Commission of 1905-6—The Facts as to their "Investigations."

In view of the contentions of the Appellants in the Circuit Court, which will probably be here repeated, as to the presumptions and weight which should be given to the Statutes and Order in question, in view of the investigations of the Legislative Committee of 1905 (the "Stevens Committee") and of the Gas Commission in 1905-6, it is thought proper to point out the facts in reference to such investigations.

Especially is it pertinent in view of the suggestion in the Brief for the City of New York, that the Statutes in question are "the outcome *of patient, exhaustive, conscientious investigation*" (p. 71); and that the "record of both these investigations shows the most painstaking effort on the part of the Joint Committee in 1905, and on the part of the Commission in 1906" (p. 75).

1. The Legislative Committee.

Vice-President Carter, who made an affidavit respecting the investigations of the Stevens Committee, upon the motion for preliminary injunction in this case, was asked in substance by *Counsel for Appellant, The City of New York*, as to the making of such affidavit and the truth of substantial statements therein, to which he replied in the affirmative (*Record*, pp. 952–3). Mr. Carter's statement of the facts, *uncontradicted*, is as follows (*Record*, p. 5281):

> "The Senate Committee of 1886, Senate Document 47 of that year, completely sustained the valuation of the Company's assets at the time of consolidation, as above appears. They had before them on their investigation, lasting nearly a year, substantially every person connected with the consolidation and were able to learn, at first hand and on the spot, all the facts in regard to amount and character of property and its value. The same data is not accessible to-day with the same fullness.
>
> As to the Legislative Committee of *1905 (known as the Stevens Committee)*, the resolution appointing it contained no provision, authorizing the Companies interested to be heard or to produce evidence or examine witnesses or participate in any way. Said Committee did not recognize at any stage the right of the Companies to participate by counsel, this Company's participation being confined to such brief additional questioning or data, as the *courtesy* of the Committee permitted. The investigation covered such a vast field and was conducted in such haste, limited in taking its testimony to *less than three weeks altogether*, that the elements entering into the question could be neither fully presented nor deliberately considered by said Committee, several members of which were absent from illness or other cause during a great part of the Committee's sittings. This Company was not permitted to address the Committee at the conclusion of the investigation, nor did the Committee have time or opportunity to consider written memoranda sub-

mitted, prior to preparation of its report to the Legislature.

"We hazard nothing in saying, that the *members of the Committee themselves* will concede the insufficiency of the time at their disposal, thoroughly and in detail to investigate, weigh and determine such important matters. The result was that, upon some most material points, *no evidence at all* was before the Committee; upon other points evidence was in such *incomplete* shape that the situation was gravely misapprehended or misconstrued by the Committee. Said Committee fell into the error of taking the figures of the *tax* report of the Company, as representing the actual value of the Company's assets as a going concern or as the Company's investment therein; and furthermore, said tax report, as summarized by said Committee, included *none of the cash working capital* of the Company, none of the *accounts receivable* which formed part of its capital, *no part of Astoria investment*, and took no note of *other assets of great value*.

"The Gas Commission of the State of Massachusetts consumed more than a year in 1904-5 in consideration of the capitalization and cost of making gas as to the Boston Companies alone."

2. The Gas Commission.

In like manner Mr. Carter had, in said affidavit, set forth the facts respecting the investigation of the Gas Commission which led to their Order here under review; and he was also asked by *Counsel for Appellant, the City of New York*, as to the truth of substantial statements therein relating to such investigation, to which he replied in the affirmative (*Record*, pp. 952-3). Mr. Carter's statement of the facts, *uncontradicted*, is as follows (*Record*, p. 5282):

"As to the action and report of the Gas Commission, filed February 23rd, last, in favor of 80 cent gas, it will be observed, that said Commission in their estimate of the value of the Company's property *wholly excluded its working capital* of $1,000,000 and its accounts receivable of $2,000,000 to say nothing of *its investment at Astoria*, then amounting to nearly $6,000,000, *its franchises capitalized under express authority* of the Act of 1884 and *other items* of great value.

"No sooner had said Commission began its investigation than certain journals of the City of New York declared and reiterated in caustic terms, that said Commission had no other duty to perform than to report in favor of 80 cent gas,

as recommended by the Stevens Committee, and criticised said Commission in unmeasured terms for not at once so reporting. Before the petitioners in favor of the reduction of the charge for gas had completed their case, and *before this Complainant in defense had had an opportunity to present a word of evidence*, the Governor of the State of New York (whose appointees the members of said Commission are) *recommended in his message* the passage of an Act, reducing the price of gas to eighty cents; promptly thereafter the Senator from New York, who was then *chief counsel for said petitioners* before said Commission, introduced a bill to reduce said rate to eighty cents, being substantially the bill which finally passed. And finally, *when it was rumored*, that the Commission did not see its way clear to reduce the rate to eighty cents, a bill was introduced in the Legislature *by Senator Stevens*, Chairman of the Legislative Committee of 1905, *to abolish the Commission.*

"Thus the minds of the Commission from the very outset, instead of being left free to flow to a natural and unbiased conclusion upon the evidence, were at every step and by every influence pressed toward a finding, which would justify the report of the Stevens Committee; and thus the Complainant, instead of receiving that fair and unprejudiced hearing, to which it was entitled, suffered grave prejudice and has never received that judicial consideration of its property rights, in behalf of which it has sought the interposition of this honorable Court."

3. General Observations.

The foregoing statements are quoted as a convenient and fair statement of undoubted facts, and as an illustration of the position which Appellee has maintained from the outset on the subject of said Investigations; but the record and circumstances of the Investigations are so far a matter of general knowledge and public record, and so clearly a part of the history of the enactment of the Statutes and Order in question, that they are regarded—independent of testimony—as subject to judicial notice.

The contention of Appellee as summarized in the evidence, through its Vice-President and Secretary, was as follows (*Record*, p. 953):

"So that you conclude that at neither of these hearings did you receive that fair and unprejudiced hearing that your

Company was entitled to? A. That was my belief as ex
pressed in that affidavit.

"Q. And in consequence you suffered grave injustice an
grave prejudice? A. Yes, sir.

"Q. *And that your Company has never received the
judicial consideration of its property rights in behalf of whic
it has sought the interposition of this honorable Court? I
We were very sure of it.*"

It need only be pointed out, in conclusion, that said Committe
reported that they found that the entire value of Appellee's "ga
making plants, *including whatever franchises it may own*, does no
exceed the sum of $30,000,000" (*Record*, p. 80), and that the Com
mission found that the value of Appellee's tangible property "di
not exceed the sum of $30,000,000" (*Record*, p. 32), while the
doubted whether its franchises were "of any considerable value"
although Appellee's *tangible property alone*, when it began busines
in November, 1884, was valued at $30,190,419.01 (*Record*, p. 501
and its "special franchises" for the year 1905 (including tangibl
rights plus mains and services in the streets) stood assessed by th
State authorities, for taxation, at a value of $27,300,000 (*Record*
p. 202).

Washington, October, 1908.

SHEARMAN & STERLING,
Solicitors for Appellee.

CHARLES F. MATHEWSON,
Of Counsel.

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APPENDIX.

Itemized Statement of Values.

	Complainant.	State.	City.	Master.	Circuit Court.
1 Real Estate	$14,558,000.*	$10,504,355.95	$10,587,685.	$13,461.000.	$11,985,435
2 Plant	15,532,489.*	9,318,692.	9,348,692.	15,500,000.	15,500,000
3 Mains	12,636,000.	7,383,583.	6,529,035.	12,636,000.	12,636,000
4 Services	1,994,000.		1,222,228.	1,994,000.	1,994,000
5 Meters & Miscellaneous property	4,200,000.	3,802,544.	3,261,687.	4,100,000.	4,100,000
6 Working capital, to wit:					
Current supplies	616,470.08			3,616,000.	1,616,000
Cash and accounts	3,000,000.				
7 National Coke & Coal Co.	50,000.			50,000.	
8 Astoria Plant	12,000,000.			12,000,000.	
Total, excluding franchises and good will	$64,586,959.08			$63,357,000.	$47,831,435
9 Franchises	24,000,000.			20,000,000.	12,000,000
10 Good will	7,500,000.				
Total assets actively employed	$96,086,959.08	$31,039,124.95	$30,949,327.	$83,357,000.	$59,831,435
Proceeds of Debentures, not yet in "Plant", but temporarily invested pending such investment	$5,500,000.00				
Total investment, active and inactive	$101,586,959.08			$83,357,000.	$59,831,435

* Exclusive of 18th St. property condemned by the City.

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IN THE

Supreme Court of the United States.

WILLIAM R. WILLCOX ET AL, constituting the Public Service Commission of the State of New York for the First District, Appellants, AGAINST CONSOLIDATED GAS COMPANY OF NEW YORK.	October Term, 1908. No. 396.
THE CITY OF NEW YORK, Appellant, AGAINST CONSOLIDATED GAS COMPANY OF NEW YORK.	No. 397.
WILLIAM S. JACKSON, as Attorney-General of the State of New York, Appellant, AGAINST CONSOLIDATED GAS COMPANY OF NEW YORK.	No. 398.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, SITTING IN EQUITY.

BRIEF FOR THE APPELLEE ON THE LAW.

This brief will discuss the legal questions involved in the present appeals, with the exception of the

inclusion of franchises and good will as a property right, which will be the subject of a separate brief.

The disputed findings of fact, and the evidence which supports the contention of the Consolidated Gas Company, will also for the convenience of the Court be the subject of a separate brief.

PART I.

STATEMENT OF FACTS.

I.

The Nature of the Proceedings.

This is an appeal by the Public Service Commission of the State of New York, The City of New York and the Attorney General of New York (each appealing separately) from a decree of the Circuit Court of the United States for the Southern District of New York, entered April 3, 1908, and fully reprinted in Vol. I, page 430 of the Record.

The decree was entered pursuant to the prayers of a bill in equity, filed on May 1, 1906, which sought to declare unconstitutional the following laws of the State of New York:

(1) Chapter 736 of the Laws of 1905.

(2) Chapter 737 of the Laws of 1905.

(3) Chapter 125 of the Laws of 1906.

The pertinent provisions of the said Acts, which were adjudged unconstitutional by the Circuit Court, are as follows:

Chap. 736 of the Laws of 1905, provides as follows:

> "SECTION 1. A corporation, association, copartnership or person engaged in the business of furnishing or selling illuminating gas in the city of New York, *shall not charge said city or receive therefrom for such gas a sum in excess of seventy-five cents per one thousand cubic feet.*
>
> "§ 2. The illuminating gas furnished or sold by any such corporation, association, copartnership or person to said city shall have an illuminating power of not less than twenty-two sperm candles of six to a pound burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour

and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. *The pressure of said illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches.*

"§ 3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of one thousand dollars *for each offense* to be sued for and recovered in the name of and by the city of New York for its benefit."

Chap. 737 of the Laws of 1905, after providing that upon formal complaint by persons therein specified, the Commission created by the Act shall investigate the price of gas and the manner of its supply by public hearing, further provides (Sec. 17)

"After such hearing and upon such investigation as may have been made by the commission or its officers, agents or inspectors, the commission, within the limits prescribed by law, may fix the maximum price of gas or electricity which shall be charged by such corporation or person in such municipality, or may order such improvement in the manufacture or supply of such gas or in the manufacture, transmission or supply of such electricity, or in the methods employed by such person or corporation, as will in its judgment improve the service. *The price so fixed by the commission shall be the maximum price to be charged by such person or corporation for gas or electricity in such municipality for a term of three years and until, after the expiration of such term such commission shall upon complaint as provided in this section again fix the price of such gas or electricity.*"

The portion of the Act, above quoted, under which as subsequently stated the Gas Commission created thereby made an order that the complainant sell its gas to customers other than the City of New York at a maximum rate of 80 cents per thousand feet, has since the filing of this bill and the decision of the Circuit Court,

been adjudged unconstitutional by the Court of Appeals of New York in Saratoga Trustees vs. Saratoga Gas Company, 191 N. Y., 123, as operating to deny to all gas companies the "equal protection of the laws" (see *post*, p. 17).

Further discussion, therefore, of this last quoted Act, and the order made by the Commission of Gas and Electricity thereunder, is unnecessary, for the Supreme Court will accept under its uniform rulings this decision by the highest Court of New York upon the constitutionality of a statute of the State of New York.

Chapter 125 of the Laws of 1906 provides:

"SECTION 1. A corporation, association, copartnership or person engaged in the business of manufacturing, furnishing or selling, illuminating gas in the city of New York, except in the fifth ward of the borough of Queens and in that portion of the borough of the Bronx formerly contained in the towns of Eastchester and Pelham, *shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of the following rates:*

"1. *In the borough of Manhattan*, in the first ward of the borough of Queens, in the borough of Brooklyn, except the thirtieth and thirty-first wards thereof, and in the borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, *eighty cents.*

* * * * * * *

"§ 2. The illuminating gas furnished by any such corporation, association, copartnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. *The pressure of illuminating gas in any service mains in the*

said city at any distance from the place of manufacture shall not be less than one inch, nor more than two and one-half inches.

"§ 3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of one thousand dollars *for each offense* to the people of the State.

"§ 4. This act shall not apply to gas furnished or sold to the City of New York."

The Acts in question are printed in full in the Record (Vol. I., pp. 21–31).

The bill in equity prayed that these Acts be adjudged in contravention of the Constitution of the State of New York and of the Constitution of the United States, in that they—

(1) Deprived the complainant of its property without due process of law.

(2) Took its property for public and private use, without just compensation.

(3) Deprived it of the equal protection of the law.

(4) Impaired the obligation of the contract rights of the complainant, under the terms of Chapter 367 of the Laws of 1884, pursuant to which the complainant acquired its assets and in reliance upon which its shares were issued and are now held.

The averments of the bill are too lengthy for adequate summary. The main averment was that the complainant possessed property, invested and used in the sale of gas, aggregating $86,000,000, upon which it is reasonably entitled to a return of 10% and that the inforcement of the legislation above referred to would yield the complainant less than 1½ per cent. profit on its actual investment. It was further alleged that compliance with the pressure provisions was "physically impossible" and that the statutes being unduly discriminating, and containing oppressive penalties, operated to deny the complainant the "equal protection of the law."

The defendants made no formal appearance, but filed answers, in which they denied the main averments of the bill.

Replication having been filed, the Court thereupon entered an order, which referred the cause to ARTHUR H. MASTEN, ESQ.,

> "one of the Standing Masters of this Court, to take all the testimony herein, make all needed computations and fully find the facts."

Before the Master the hearings extended from July 17, 1906 to June 12, 1907. The voluminous testimony will be found in Vol. II. to VI. inclusive of the Record and comprise with the Exhibits over 6000 printed pages.

Julius M. Mayer, the Attorney of the State of New York, having been succeeded in office by Willam S. Jackson, the latter was duly substituted as a party defendant in his place, and the suit was revived as to him by an order entered herein on June 15, 1907.

On June 6, 1907, the State of New York enacted a new and comprehensive Public Service Commissions Law, which became operative July 1, 1907. It repealed Chap. 737 of the Laws of 1905, constituting the Commission of Gas and Electricity, and substituted for that body the new Public Service Commission. Under Section 85 of the new Act it was further provided:

> "This Act shall not affect pending actions or proceedings, civil or criminal, brought by or against the Board of Railroad Commissioners or the Commission of Gas and Electricity or the Board of Rapid Transit Railroad Commissioners, but the same may be prosecuted or defended in the name of the Public Service Commission, provided the subject matter thereof is within the statutory jurisdiction of such Commission."

Pursuant to the new law the Public Service Commission was on October 1, 1907 substituted as defendants for the former "Commission of Gas and Electricity" and the suit

> "continued against them as parties defendant herein without prejudice to the proceedings already had herein, the answer

> of said last named defendants heretofore filed herein to stand as the answer of "

the new Public Service Commission.

The Master's Report, which was filed on June 24, 1907, after full opportunity had been given to all counsel to correct his findings of fact and law, is also too lengthy for adequate summary. It will be found in the Record (Vol. 1, pp. 151-291). Further detailed reference will be made to the respective findings of the Master and the Circuit Court in a separate brief upon the facts. For the purposes of this argument on the law, it will suffice to state very briefly the main findings of the Master and those of the Circuit Court.

1. The value of complainant's property.

The Master found that the real value of the complainant's property, upon which under the Fourteenth Amendment a reasonable return should be allowed was $83,357,000. The Circuit Court found such value to be $59,831,435.

Upon this property as thus valued the Master found (Record, Vol. 1, p. 255) that

> " in view of the character of complainant's business and other features, which are to be taken into consideration, a just and reasonable rate of return upon the value of the investment in complainant's gas business is not less than the legal rate of six per cent. per annum."

2. The rate of return under the legislative rates.

The Master further found that the net earnings of the Company were $4,983.928.31 and that if the statutory rate of 80 cents per cubic thousand were enforced, the net earnings would be only $2,327,328.31, which, upon the Master's valuation of the property invested, would return 2.8%. This return the Master found was not " a fair or reasonable return on the value of the property."

The Circuit Court, while differing with the Master in some of the details of the calculation and while reducing the aggregate valu-

ation of complainant's property more than $23,000,000, sustained the finding of the Master that the complainant was entitled, upon its invested property, to *at least* 6%, and that the enforcement of the statutory rate would result, even upon the reduced valuation of the Circuit Court, in a return to the complainant company of less than 6%. It held that the complainant Company would in the event of the enforcement of the rate receive about 5% upon its investment, and this the Circuit Court held to be legislatively unfair and unreasonable.

The Court said (Record, Vol. 1, p. 428):

> "Defendant's urge that under Milwaukee etc. Co. vs. Milwaukee, 87 Fed. Rep., 577, and Spring Valley Water Works vs. San Francisco, 124 Fed. Rep., 574, the rate of return should be fixed at 5 per cent. instead of 6 per cent. Beyond stating my belief that such is not the necessary result of these cases, nothing need be added to the discussion of this subject in the opinion already filed, wherein I believe the reasons for the conclusion arrived at are plainly set forth. It is, however, fair to add, as suggested by some counsel, that the 6 per cent. rate has been arrived at in part by taking judicial cognizance of local business conditions.
>
> It has not been asserted, and is not believed, that 6 per cent. is a profitable, satisfactory or attractive rate for the investment of capital in a gas business. In my opinion it is none of these things, *but it is the lowest rate which in the City of New York can be considered legislatively fair to those who are already engaged therein and cannot readily escape.*"

In its final decree, the Circuit Court found (Record, Vol. 1, p. 433):

> "The *lowest* rate of return, which can be considered legislatively fair, just or reasonable, upon the value of the property employed by Complainant in the business of manufacturing and supplying gas, is six per cent., at which conclusion the Court has arrived in part by taking judicial notice of local conditions in the City of New York; and under the two Acts and the order, copies of which are annexed to the bill

of complaint as Exhibits A, D and C, to wit, Chapter 736 of the Laws of 1905 of the State of New York, Chapter 125 of the Laws of 1906 of said State and the order of the Commission of Gas and Electricity of the State of New York, made on the 23rd day of February, 1906, and directed to the Complainant, the net annual income which the Complainant can earn upon the property employed in its gas business as aforesaid *is less than six per cent.*"

3. The Question of Pressure.

As to the question of pressure, the complainant contended that, owing to the variations of pressure, caused by differences in elevation and by atmospheric and barometric conditions in connection with the varying consumption by consumers, it is necessary at times to exceed a maximum pressure of two and a half inches at certain points; that some of the mains are at an altitude of 250 feet above tide level, and that a difference in altitude results in a difference of pressure (owing to the levity of gas), and it is therefore impossible to maintain the pressure required by the statute "at every point and at every time."

The Master found (Record, Vol. I., p. 250):

> "*Under the distributing system as now existing and in operation, it is not possible to fulfill the statutory requirements as to pressure.* It would, however, apparently be possible to remedy this condition, at least to some degree, by dividing the city into different districts according to the varying levels and by regulating the pressure in each by district governors. The efficacy and safety of such governors is not free from doubt and the evidence affords no sufficient basis for an estimate of the cost of their installation or the expense of making the necessary changes in the system of mains."

The Court sustained this finding as follows (Record, Vol. I., p. 420):

> "On this point I think the testimony amply supports the Master's finding, which is in substance that the pressure

required by law is not physically impossible, *if the entire system of gas distribution in this City be reconstructed.* It is a scientific fact, incapable of change even by legislation, that pressure in a gas pipe varies with altitude. By the expenditure of about $4,000,000 for construction of mains and valves *alone*, exclusive of any pumping stations or other apparatus, it might be possible to establish and maintain the pressure called for by these Acts. *Such a thing is commercially impossible, and even if it were done (of course at complainant's expense) it remains commercially impossible, since the other parts of the statutes cut off the surplus income out of which alone complainant could be expected to perform the work. A change by means of new capital would be impossible because, when made, it would not add a dollar to income.*"

4. The Effect of the Penalty Provisions.

As to the oppressive character of the penalties, the Master found (Record, Vol. I., p. 255) :

"I find that the complainant has about 390,000 customers in the City of New York, to whom bills are sent monthly ; that the penalty imposed by Chapter 125 of the Laws of 1906 is $1,000 for each charge for gas in excess of eighty cents per thousand feet to customers other than the City of New York, and that the penalties accruing against complainant, if it charged more than eighty cents, would amount in the aggregate to about $390,000,000 per month, and over $4,680,000,000 per year, or fifty times as much as the value of the entire assets, employed in complainant's gas business, as found by me.

"I also find that by Chapter 737 of the Laws of 1905 it is provided that where a price in excess of the statutory rate is demanded, that fact shall constitute a complete defense to an action for a recovery for the amount of gas delivered, and that no recovery shall be had therein.

"I also find that the penalty of $1,000 for each offense, violating Chapter 736 of the Laws of 1905 and Chapter 125 of the Laws of 1906, which provide that the pressure of illuminating gas in any service main in the City of New York

at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches, would aggregate $5,000 per diem upon evidence recorded at each of the five city testing stations of only a single violation per diem of said laws, or at the rate of $1,800,000 per year, under complainant's distributing system as now existing and in operation, which amounts are liable to be increased by additional or more frequent tests.

"*I also find that said penalties, so far as the evidence shows, are unexampled in extent and severity.*"

The Circuit Court thus sustained this finding (Record, fol. 1, p. 420):

"The Master enters upon a computation of the effect of these penalty clauses in the case of a corporation having about 390,000 customers and concludes that 'said penalties so far as the evidence shows are unexampled in extent and severity'. This is but confirmation of the finding based on affidavits made when the preliminary injunction herein was granted. I think there is nothing to add to the statements of facts and law set forth at 146 Fed. Rep., p. 154. I am of the opinion that the penalty clauses in both the statutes are clearly obnoxious to the remarks of BREWER, J., *in Cotting vs. Kansas City Stock Yards Co.*, 183 U. S., 79."

The final decree of the Court will be found in the Record, Vol. 1, p. 430. Its ultimate findings are:

5. The Ultimate Findings of the Court.

"IV. The pressure required by said two Acts and the order aforesaid is not physically impossible, if the entire system of gas distribution in the City of New York be reconstructed; *but compliance with such requirement is commercially impossible under the rates for gas prescribed by said two Acts and order.*

"VI. The two said Acts and the order mentioned in the bill of complaint, viz: Chapter 736 of the Laws of 1905 of the State of New York, entitled, 'An Act in relation to the price of illuminating gas furnished or sold to The City of

New York, and providing a penalty for violation'; Chapter 125 of the Laws of 1906 of said State, entitled, 'An Act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers, other than said City, and providing a penalty for violation'; and an order of the Commission of Gas and Electricity of the State of New York, made on the 23rd day of February, 1906, and directed to the Consolidated Gas Company of New York, copies of which were annexed to the bill of complaint herein, are each of them hereby declared and adjudged to be illegal and void, because in contravention of the Fourteenth Amendment to the Constitution of the United States, in that they take Complainant's property without due process of law and without just compensation, and deny to Complainant the equal protection of the law."

Permanent injunctions were therefore decreed to restrain the defendants from enforcing or attempting to enforce these unconstitutional statutes, and from this decree the present appeals are taken.

II.

History of Gas Legislation.

Before discussing the questions of law, it may be important to review very briefly the history of the legislation, which, by successive stages, has threatened to destroy complainant's earning power.

The complainant company was organized in November, 1884, under the provisions of Chapter 367 of the Laws of 1884, by which authority was given (p. 17)

> " to form a single corporation, which might be capitalized and issue its shares to an amount not exceeding the fair aggregate value of the property, franchises and rights of the several companies thus to be consolidated."

It was formed by a consolidation of six existing gas companies. By an appraisal made during the summer of 1884, the tangible property of these six companies was found to aggregate $29,994,000, and the intangible property, consisting of franchises and rights, was then estimated at $7,781,000. Upon these assets, aggregating $37,775,000, the complainant company fixed its capital stock at $39,078,000, that being "the actual market value of the shares of the constituent companies at that time," leaving a balance of $1,303,000 to provide working capital. Stock to the aggregate of $37,775,000 was thereupon issued to the six constituent companies in purchase of the shares of the constituent companies.

Subsequently, by successive increases, the complainant's capital was with the expansion of its business increased by authority of law to $80,000,000, all of it representing either the retirement of existing obligations or new cash capital.

In July, 1904, authority was obtained for a further increase of the capital stock to $100,000,000. The additional shares have not been issued, but six per cent. debentures have been issued, which are convertible into stock of the company at par.

Hardly had the complainant been incorporated than the Senate of New York appointed in 1886 a Committee to investigate the "consolidation and capitalization" of the six constituent companies. The Committee held that the valuation given to the franchises of $7,780,000 was not more than their "fair aggregate value" and that "any attempt to upset such value would be futile." It also concluded :

> "The stock has been issued and circulated and by virtue of law ; about one-sixth of it is held by innocent holders and nothing but the clearest proof of fraud and violation of the law, by virtue of which it was issued, would justify any attempt to render such stock worthless."

The Committee further recommended that the Company should receive a return

> **"not exceeding 10% with a reserve fund of 10% of the capital in addition."**

These conclusions were apparently accepted by the Legislature and the public as sane and reasonable, and no attempt was made until 1897 to interfere with the complainant's business as to rates, which, responsive to public needs, rapidly grew in facilities until to-day it is probably the greatest gas plant in the world.

The Company had already anticipated the demand for cheaper gas, and, although at the time of its formation, the cost of gas was $2.25 per thousand cubic feet, it voluntarily reduced its charges for gas to $1.75 per thousand, and subsequently to $1.50 and later to $1.25, the latter being fixed as a maximum by Statutes of 1886 (Ch. 322) and 1890 (Ch. 566, § 70) in all Cities of over 800,000 inhabitants.

In 1897 the Legislature, by chapter 385 of the Laws of 1897, provided that gas should be sold " for the remainder of that year at $1.20, for 1898 at $1.15, for 1899 at $1.10, for 1900 at $1.05 and during each year thereafter at $1.00." It was thus evidently contemplated that no further reduction was possible and that $1 was an " irreducible minimum."

As these changes were not confiscatory (although with the increased cost of labor and materials the Company's earnings were substantially reduced), the complainant accepted the legislation and reduced its price accordingly.

On March 6, 1905 the Legislature appointed a joint Committee to investigate all of the gas and electric companies of the City of New York. Said Committee proceeded to investigate, with the fairness characteristic of such inquisitorial bodies and which strongly reminds the student of history of the Court of the Star Chamber. Although the Companies were virtually all on trial, the Committee *refused* to recognize their right to participate by counsel, and their right to defend themselves was confined " to such brief additional questioning or data as the *courtesy* of the Committee permitted."

Although it took the present experienced Master *nearly one year* to take the testimony and make his findings as to the complainant's gas lighting business alone, this Committee finished its investigation *of all the gas and electric lighting companies* of New York *in less than*

three weeks! The complainant was not permitted to make any argument before the Committee at the conclusion of the investigation.

In its report the Committee made recommendations as to the price of gas and the maximum pressure, which were substantially embodied in Chapters 736 and 737 of the Laws of 1905.

The Gas Commission, created by the latter Act, next proceeded to investigate the complainant company, and on February 23, 1906, made an order directing the complainant to sell its gas to the City of New York for public lighting at 75 cents and to all individual consumers at 80 cents.

As this order has been adjudged void by the Court of Appeals of New York in the Saratoga gas case *(post*, p. 17), it seems unnecessary to show from that testimony how little real opportunity was given this complainant to safeguard its great property rights.

Under the Act, creating the Gas Commission, any Gas Company, aggrieved at the action of the Gas Commission in reducing the price of gas, was permitted an appeal to the Appellate Division of the Supreme Court.

This complainant appealed to the Appellate Division of the First Department to review said Order, and, although the Legislature had expressly provided for such a review, it promptly destroyed *as to the complainant* the right of appeal by passing on April 3, 1906, Chapter 125, which converted the appealable order of the Commission into an arbitrary legislative fiat. As this only applied to New York City, the complainant was thus denied an appeal, to which every other Gas Company in New York State was entitled as of right.

The Commission of Gas and Electricity did not long survive its action, for the Legislature repealed Chap. 737 of the Laws of 1905, and constituted by chapter 439 of the Laws of 1907, the Public Service Commission, with the proviso that the orders and decisions of the previous Commission should be unaffected by the repeal. These orders were, as previously stated, nullified when the Court of Appeals of the State of New York, on February 18, 1908, decided that so much of Chap. 737 of the Laws of 1905,

as conferred power upon the Commission of Gas and Electricity to fix the maximum price of gas was unconstitutional in having denied to the Gas Companies the "equal protection of the laws." (See Trustees of Saratoga v. Saratoga Gas Co., 191 N. Y., 123).

The Court of Appeals said:

> "What we do hold is that a statute of the character of the one before us to be valid must confer equal rights on both parties, the consumers and the companies. It was said on the argument that the omission in the statute to give the companies an equal right with the consumers occurred through inadvertence. If so the inadvertence is to be regretted, for it constrains us to declare invalid the portion of the statute before us which we would otherwise uphold. It, however, is an objection that can be readily remedied by legislation giving all parties in interest an equal right to appeal to the commission for a readjustment of rates.
>
> The order of the Appellate Division should be reversed *and the order of the commission vacated* and set aside, with costs in both courts."

The only questions, therefore, which are longer open on this appeal are whether Chap. 736 of the Laws of 1905, which required us to sell gas to the City of New York at 75 cents per thousand feet, and Chap. 125 of the Laws of 1906, which required us to sell gas to other consumers at 80 cents per thousand feet, are constitutional.

Apart from the findings of fact of the Master and the Court, as to the unremunerative character of the return if these Statutes should be enforced, the complainant below has at all times contended and still contends that these statutes *are void upon their face and without respect to any evidence taken in the case.* So far as the penalties are concerned, the Circuit Court, both in the preliminary opinion of Judge LACOMBE and the final opinion of Judge HOUGH, sustained this contention. Unless the penalty provisions are separable, the Acts in question must be declared void, but if

separable, there yet remain legal objections to the constitutionality of these Statutes *upon their face* upon which the Court below did not find it necessary to pass and which will be discussed later in this brief.

III.

The Assignments of Error.

Having thus briefly reviewed the facts of the case, we pass to a discussion of the legal questions involved in the many assignments of error, and here we are impressed, as the Court is likely to be impressed, by the unnecessary duplication of such assignments in the three appeals. In this case, the Public Service Commission has filed 17 assignments of error, the Attorney General 20 and the City of New York 122. Many of these are not assigned in conformity with Rule 21 of the Supreme Court and to all the assignments collectively may well be applied the criticism of the Supreme Court in Phillips Construction Co. v. Seymour, 91 U. S., 648, where this court said of only fifty-two assignments :

> "The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points. *This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on. We can only try to respond to such points made by counsel as seem to be material to the judgment, which we must render.*"

For us to treat the assignments of error *seriatim* would unduly expand this brief and would be more confusing than illuminating.

Many of them relate to questions of fact, which will be discussed in a separate brief. As to the questions of law, we prefer to follow the example of the Supreme Court in the case last cited and "respond to such points made by counsel as seem to be material to the judgment." We shall therefore submit and discuss affirmative points and we believe that these will fully answer all of the questions of law involved in the many assignments of error.

In this brief, therefore, we shall discuss the following points:

I. The complainant was without adequate remedy at law and a Court of equity had jurisdiction.

II. The Eleventh Amendment does not forbid the institution of this suit.

III. The provisions in the said statutes as to pressure are unconstitutional and invalidate both statutes.

IV. The provisions in the statute as to penalties are unconstitutional on their face and invalidate both statutes.

V. Both statutes are unduly discriminatory and therefore unconstitutional upon their face.

VI. The finding of the Circuit Court that the rates prescribed would yield this complainant less than a just and reasonable rate of return is a finding of fact and not a conclusion of law, and this Court therefore should give to such finding the controlling weight of a special verdict of a jury and not reverse such finding except for clear and indubitable error.

VII. Where the rate is prescribed by the Legislature and not by an administrative body, it is equally subject to judicial review as to its confiscatory character.

VIII. The Fourteenth Amendment invalidates a rate, if it yield less than just "remuneration," even though it yield some return.

IX. The rule that the fair return must not be less than the legal rate of interest is justified on reason and authority.

X. The basis of the calculation is the present value of the property and not its original cost.

XI. The costs were properly imposed upon the respondents, including one-half thereof upon William S. Jackson, as Attorney General of the State of New York.

XII. The Circuit Court was without power to make relief from an unconstitutional statute conditional upon the acceptance by complainant of a new rate to be fixed by the Court.

XIII. The Circuit Court properly assumed jurisdiction of the controversy.

PART II.

THE ARGUMENT ON THE LAW.

POINTS.

I.

The complainant was without adequate remedy at law and a Court of Equity had jurisdiction.

Until the Master decided against appellants upon the facts, the respondents below did not attempt to question the jurisdiction of the Court, except in a very formal and perfunctory way. They did not file any special appearance or motion to dismiss the bill for want of jurisdiction, but appeared generally and *joined issue with complainant on the merits.* They did incidentally raise the jurisdictional questions by their answers, but on the oral argument before Judge LACOMBE as to whether a preliminary injunction should issue, the jurisdictional questions were not pressed and the respondents apparently preferred to take their chances before a Master of disproving the allegations of complainant's bill. It was not until the Master found in favor of the complainant that the jurisdiction of the Court was vigorously questioned.

Primarily that jurisdiction is assailed on the ground that the complainant had an adequate remedy at law and that therefore a Court of equity was without jurisdiction. The suggested adequate remedy at law is that the Company shall charge the price of gas which existed before the legislation in question was enacted and shall then await the suits by the State and the consumers and then asserts its Constitutional rights by way of defense. Both the bill and the proofs disclose the undisputed fact that the complainant has 390,000 customers in the City of New York, to whom it renders monthly bills, and that if it followed the remedy suggested by the respondents, it would then become the *imperative duty* of the Attorney General of New York and the District Attorney of

New York County, under Section 1962 of the Civil Code, to commence actions against the complainant for the sum of $1,000 *for each charge in excess of the statutory rate.* The institution of these suits for penalties is not discretionary with the officials named. Section 1962 of the Civil Code provides:

> "Where real or personal property has been forfeited, *or a penalty incurred* to the people of the State, or to an officer for their use, pursuant to a provision of law, the Attorney-general, or the District Attorney of the county in which the action is triable, **must** bring an action to recover the property or penalty in a court having jurisdiction thereof."

Had this course been followed, moreover, it is not unreasonable to assume that the consumers would have refused to pay in excess of the statutory rate and as monthly collections are essential to the Company's operations, it would have been under the necessity, either of bringing separate suits against 390,000 customers or of threatening to remove their meters unless they paid the price demanded by the Company, in which event many of the customers would in turn have instituted suits against the Company to enjoin it from such removal.

Thus interminable litigation, clogging the Courts, and burdening both the company, its customers and the public with wasteful court expenditures, would have resulted, with confusing and contradictory results, for in each case this complainant could have asserted and sought to prove anew its contention that the statutes were unconstitutional because of their oppressive operation. Moreover, no course would have been more prejudicial to the consumers than the one indicated. If the Company had threatened to take the meters out of the houses unless its bills were paid, many would have paid to avoid expensive litigation and immediate inconvenience. Thus, if the statutes are sustained as constitutional, many would have paid the excess without any protection as to repayment. Under the present suit, the whole controversy is litigated without expense to the consumer, whose interests are fully protected

by the impounding in the registry of the Court of the disputed excess. WHAT COULD BE MORE EQUITABLE?

The Appellants, however, without questioning that the avoidance of a multiplicity of actions is a ground for equitable jurisdiction contend that in the case at bar the possible multiplicity of actions is more imaginary than real.

As to the suits for penalties, which, as previously stated, the Attorney General and District Attorney "*must*" bring to enforce the statutory rate, Appellants claim that although this Company should charge the excess rate in 390,000 separate instances, the State could only bring a single action to recover a single penalty of $1,000.

In support of this contention they cite

Jones v. Rochester Gas Co., 168 N. Y., 65, 68;
Cox v. Paul, 175 N. Y., 328;
Griffin v. Inter-Urban St. Ry. Co., 179 N. Y., 438; 180 N. Y., 538.

These cases do not sustain Appellant's contention. They arose under other Statutes with very different provisions.

Jones v. Rochester Gas Co., *supra*, was an action to recover penalties under Section 65 of the Transportation Corporation Law (L. 1890, Ch. 566), which provided that if upon application of the owner or occupant of a building to a Gas Company, for the use of gas or electricity,

> "the corporation shall refuse or neglect to supply gas or electric light, as required, such corporation shall forfeit and pay to the applicant the sum of ten dollars and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue."

The Court simply held that while the plaintiff was "entitled to recover *for the whole period up to the time when the defendant supplied the premises with gas*", yet the cause of action, being single, was indivisible and but one recovery therefor could be had.

In Cox v. Paul, 175 N. Y., 328, plaintiff sued under Section 53 of the Stock Corporation Law, providing for the inspection by the stockholder of the stock book of the corporation, under a penalty of $250 "upon each officer who refuses to exhibit the stock book, and also a like penalty on the corporation". Plaintiff brought three separate actions for the penalties against the Secretary, the President and the corporation.

The language of the statute is:

> "For any refusal to allow such book to be inspected, such corporation and the officer or agent so refusing shall each forfeit the sum of $250, to be recovered by the person to whom such refusal was made".

Under the Statute, the plaintiff recovered one penalty against the Secretary, two against the President and three against the corporation, on the ground that he had made *continuing* demands on several consecutive days. The Court held, however, that

> "there was really but *one* demand, *one* refusal, *one* occasion and *one* transaction, though continuous as to time."

The distinction between these cases and the case at bar is clearly shown in Griffin and Scudder v. Inter-Urban St. Ry. Co., 179 N. Y., 438, s. c. 180 N. Y., 539, upon which the Appellants chiefly rely. In that case, two separate plaintiffs sued for penalties, under Section 104 of the Railroad Law, providing for free transfers on street railways, which *inter alia* provided that

> "*for every refusal* to comply with the requirements of this section, the corporation so refusing shall forfeit fifty dollars to the aggrieved party". * * *

The two plaintiffs in question sued for cumulative penalties, Griffin for four penalties of $50 each for four refusals, and Scudder for five such penalties. The Court of Appeals held:

> "It is no doubt the rule to be deduced from the decisions of this Court that no action for cumulative penalties is

> permissible unless it is clear from the language of the Act inflicting the penalty that it was the intention of the Legislature to provide a penalty *for each and every violation of the Statute*".

It will be noted that both plaintiffs recovered penalties. To make this decision applicable to the case at bar, the learned counsel for Appellants must logically contend that when Griffin recovered his penalty for a refusal of the Street Railway to give him a transfer, this operated as a waiver of the right of every other passenger in the City of New York, who was similarly refused a tranfer, to sue for a penalty. As both Griffin and Scudder were each allowed to recover penalties, it is obvious that the Court of Appeals did not intend, where penalties might accrue to several millions of passengers, that the recovery of one was a waiver of the rights of all the others.

Indeed the Court of Appeals expressly distinguished between the words "for *every* refusal" and the words "for *each* refusal", and cited Suydam v. Smith, 52 N. Y., 383, where the Statute contained the words "for each offense", and *cumulative penalties were permitted.*

On re-argument of the Griffin case, the Court said (180 N. Y., 539):

> "In Suydam v. Smith, 52 N. Y., 383, where the recovery of cumulative penalties was upheld, the statutory words imposing the penalty were "for each offense". We think that "every" is not always necessarily the synonym of "each".

Both Chap. 736 of the Laws of 1905 and Chap, 125 of the Laws of 1906 provide that any person or corporation violating any provision of this Act

> "shall forfeit the sum of $1,000 **for each offense** to the people of the State."

This language is unequivocal and admits of no other construction. It was obviously designed, not simply to prevent a uniform overcharge to all the customers, but to prevent an overcharge as against

any one of them and, however drastic, it admits of but one interpretation and that is that the State could recover a penalty of $1,000 *on each occasion* that the Consolidated Gas Company charged *any* of its customers a sum in excess of the statutory rate. The Statute was punitive in character and designed to compel the Company to adhere to the provisions of the Act. It therefore borders on the ridiculous to assume that the Act meant that if the Consolidated Gas Company violated its provisions in 390,000 different instances, each of which constituted by the words of the Act a separate offense, the State could only recover one penalty of $1,000.

Moreover, decisions affecting penalties due *individuals* can hardly apply to a penal Statute, where *the State* seeks to enforce a measure of public policy. The provisions in the gas Statutes were undoubtedly passed to compel the Gas Companies, *as to each of their customers*, to comply with the legislative provisions as to price, pressure and illuminating power. The Consolidated Gas Company might violate these as to all of its 390,000 customers or as to any number thereof. Is it credible that the Legislature intended only one penalty of $1,000, irrespective of the number of violations of the Statutes, or did it not intend that "for each offense", as it plainly said, the Gas Company should pay the penalty?

The clear purpose of the State to make these penalties cumulative is further shown by Section 21 of the Gas Commission (Chap. 737 of the Laws of 1905), which provides:

> "*Defense in cases of excessive charges.* If it be alleged and established in an action brought in any court for the collection of any charge for gas or electricity, that a price has been demanded in excess of that fixed by the Commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defense to such action."

The purpose was thus shown to individuate each overcharge as to each of the Appellee's 390,000 customers. If, therefore, under

the terms of these two Statutes, complainant charged more than 80 cents, it forfeited as to each of its customers the right to make any charge whatever, and it further forfeited to the State the sum of one thousand dollars. If, as contended by Mr. Whitney, this Company can violate the Acts 390,000 times and only pay one penalty of $1,000, such insignificant penalty would not in itself have any deterring effect and the effort of the Legislature to compel the Gas Companies to comply with its mandate by punitive penalties of a drastic character is too clear to be gainsaid. The legislation may be ridiculous in its severity. It however does not stand alone in this respect, as is readily seen by reference to the Stock Yards Case (183 U. S., 79), and *Ex parte* Young (209 U. S., 123), where similar drastic penalties were construed in accordance with the fair import of the language used by the Legislature.

Even were the penalties due the State non-cumulative, there still remain—unaffected by the question of cumulative penalties—the interminable litigation and possible stupendous losses, to which the Company would be subjected if it had to sue its 390,000 customers to recover a rate in excess of the statutory rate. It is true that Mr. Whitney in his brief for the Public Service Commission (p. 164) suggests that we could sue a few of our consumers as the representatives of all, but as there is no legal joinder of interest, such suits would only have concluded the actual defendants therein. Of necessity, each would have to be a separate suit, and if the Company failed in such a suit, under the very terms of the Act, it forfeited even the amount which the Statute allowed as the price of gas. If, on the contrary, it asserted its right to remove the meters unless it received the sum it claimed, interminable litigation would necessarily result, for the householder would not do without gas but would either assert the statutory charge by an injunction suit or submit to the Company's demands.

For this reason the jurisdiction of a Court of equity can be justified upon the broader ground of the "public interests". This was done in City of Cleveland v. Cleveland St. Ry. Co., 194 U. S., 531, in which Mr. Justice WHITE said :

> "Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that, in view of the controversies, confusion, risks and multiplicity of suits which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, **and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity.**"

We confess we did not think this question of equitable jurisdiction even debatable in view of the repeated and uniform rulings of this Court, until we find it again raised by counsel of unquestioned ability and sincerity.

We content ourselves with quoting the language of this Court in Smyth vs. Ames, 169 U. S., 466:

> "The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. *Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation, by which such highway is maintained.*"

To this leading case may be added a reference to the most recent case in this Court (*Ex parte* Young, 209 U. S., 123, 133, decided March 23, 1908, where Mr. Justice PECKHAM, speaking for the Court, said:

> "It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the Act pending subsequent proceed-

ings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery. * * * From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the Act invalid. * * *

All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all, who are directly interested, parties to the suit and enjoining the enforcement of the Act until the decision of the Court upon the legal question."

Mr. Whitney's brief for the Public Service Commission (p. 162) suggests that as the Public Service Commission Act provides for an institution by that body of an action for mandamus to enforce the provisions of the legislation, the Complainant's true remedy was to await such action and defend therein. The answer to this argument is that the Public Service Commission Act was passed on June 6, 1907, and became operative July 1, 1907, while this bill was filed on May 1, 1906. Assuredly the jurisdiction of the Court cannot be ousted by an event which took place more than a year after the filing of the bill. It is true that the Gas and Electric Commission Act of 1905 also contained a provision for mandamus, but Mr. Whitney concedes (p. 4) that this only referred to rates prescribed by the Gas and Electric Commission and their power to prescribe any rate was annulled by the Court of Appeals in the Saratoga Gas Case *(supra*, p. 17). It is therefore true, as con-

ceded by Mr. Whitney, that no power to try this case in a mandamus proceeding existed at the time the bill was filed, but even if it had, the Commission might never have invoked the remedy of mandamus and in the meantime the Gas Company, if it stood on its constitutional rights, was threatened not only with stupendous penalties in suits by the State but interminable litigation by its customers.

Mr. Whitney further suggests (p. 169) that jurisdiction is also lacking because there was

> "no allegation or proof indicating that the Attorney General or the District Attorney threatened to bring an unreasonable number of penalty actions or that there was any reason to suppose that either of them would do so."

The answer to this is that under Section 1962 of the Civil Code *(ante,* p. 22), the Attorney General and District Attorney have no discretion whatever but "MUST BRING" such an action where a penalty has been incurred.

II.

The Eleventh Amendment does not forbid the institution of this suit.

(a) The Eleventh Amendment does not apply to a suit against a State official, who is seeking to enforce an unconstitutional statute.

In the Court below, counsel for Appellants contended that this suit was one against the State within the meaning of the Eleventh Amendment. This contention was made, however, before the Supreme Court, in *Ex parte* Young, 209 U. S., 123, definitely settled the question and closed it to further forensic controversy. We infer from the Appellant's briefs that they have now practically

abandoned the assignments of error which raised this question, and we content ourselves with simply quoting the language of this Court in Smyth vs. Ames, 169 U. S., 466:

> "But to prevent misapprehension, we add that within the meaning of the Eleventh Amendment of the Constitution the suits are not against the State, but against certain individuals charged with the administration of a State enactment which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. **It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them, as officers of a State, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment.**"

See also,

Pennoyer v. McConahey, 140 U. S., 1.
Scott v. Donald, 165 U. S., 58.
Cotting v. Stockyards Co., 183 U. S., 79.
Prout v. Starr, 188 U. S., 537.
Miss. Ry. Com. v. Illinois R. R. Co., 203 U. S., 335.
Ex parte Young, 209 U. S., 123.
Scully v. Bird, *id.*, 481.

In Fitts vs. McGhee (172 U. S., 516), upon which defendants relied in the Court below, there was nothing in the Act in controversy or any other law of Alabama, which made it the special duty of the defendants to enforce the statute, the penalty for which was, as stated, recoverable by the party overcharged as a penal debt due him. Mr. Justice HARLAN, speaking for the Court, said (p. 530):

> "*In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement.*"

The case at bar is thus plainly distinguishable from Fitts v. McGhee, for in each of the Acts, which we claim to be unconstitu-

tional, penalties are provided, for which, under Section 1962 of the Code the Attorney General and District Attorney "**must**" **bring civil actions** (see *ante*, p. 22).

In *Ex parte* Young, this Court, distinguishing Fitts vs. McGhee, said :

> "It is objected, however, that *Fitts v. McGhee*, 172 U. S., 516, has somewhat limited this principle, and that, upon the authority of that case, it must be held that the State was a party to the suit in the United States Circuit Court, and the bill should have been dismissed as to the Attorney General on that ground.
>
> We do not think such contention is well founded. The doctrine of Smyth v. Ames was neither overruled nor doubted in the Fitts case. In that case the Alabama legislature, by the act of 1895, fixed the tolls to be charged for crossing the bridge. The penalties for disobeying that Act, by demanding and receiving higher tolls, were to be collected by the persons paying them. *No officer of the State had any official connection with the recovery of such penalties.* * * * As no State officer who was made a party bore any close official connection with the Act fixing the tolls, the making of such officer a party defendant was a simple effort to test the constitutionality of such Act in that way, and there is no principle upon which it could be done. * * *
>
> In making an officer of the State a party defendant in a suit to enjoin the enforcement of an Act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the Act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.
>
> *It has not, however, been held that it was necessary that such duty should be declared in the same Act which is to be enforced.* In some cases, it is true, the duty of enforcement has been so imposed. (154 U. S. 362, 366, section 19 of the Act) but that may possibly make the duty more clear ; if it otherwise exist it is equally efficacious. The fact that the State officer by virtue of his office has some connection with the enforcement of the Act is the important and material fact, and whether it arises out of the general law, or is specially created by the Act itself is not material so long as it exists."

It is obvious that the case at bar is on all fours with the decision of *Ex parte* Young and the preceding cases, and is plainly distinguishable from Fitts v. McGhee.

(b) Even if this suit be, within the meaning of the Eleventh Amendment, against the State, it has waived its immunity.

The Attorney-General did not appear specially to question the jurisdiction of the court; on the contrary, he joined with the other defendants as "Attorney-General of the State of New York" in filing an answer, which took issue with the complainant on the merits and only incidentally suggested, not by way of demurrer, that the suit was in effect a suit against the State of New York.

That such an appearance is in effect a waiver was expressly ruled in the very recent case of Gunter, Attorney-General v. Atlantic Coast Line (decided January 15, 1906), 200 U. S. 273, in which it appeared that the State of South Carolina passed a law for the assessment and taxation of property, and under it the C. & D. Railroad was assessed in the counties of Darlington and Chesterfield. It became the duty of the respective treasurers of those counties to collect *the state* and county taxes. A stockholder of the road filed a bill to enjoin the railroad and the treasurers of the two counties from collecting both taxes. An answer was filed for the two County Treasurers, signed by "the Attorney-General of the State of South Carolina for defendants." The Supreme Court held

> "*although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby and cannot escape the results of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.*" (Citing Clark v. Bernard, 108 U. S., 436, 447).

In Gunter v. Atlantic Coast Line, as in the case at bar, the State was not a party *eo nomine*, but as the proceeding was to enjoin the collection of State taxes, the appearance of the Attorney-

General, as "Attorney-general of the State," if in effect an appearance for the State, was a waiver of its immunity. Similarly, if a suit against the Attorney-General to restrain him from enforcing an unconstitutional statute is a suit against the State, *which we do not concede*, yet his general appearance "as Attorney-General" in that case, and his taking issue with the complainant upon the merits of the case, is a waiver by him of any possible immunity, which the State enjoys under the Eleventh Amendment. If it had a right to assert immunity, it was necessary to assert it in accordance with equity procedure, which was to appear specially and moved to dismiss the suit, before great expense had occurred in its prosecution. Instead, the Attorney-General joins issue with the complainant on the merits of the cause, participates in all the proceedings before the Master, and it is too late for him now to assert, after the Master has found the facts against him, that the State can shield itself behind the Eleventh Amendment.

III.

The provisions of said statutes as to pressure are unconstitutional and invalidate both statutes.

Having discussed the jurisdiction of the Court, we now pass to the first objection to the constitutionality of the legislation in question.

Each of the Statutes, in specifying the price and candle power of the gas to be manufactured and delivered to the consumer, further require as an essential part of the same "legal standard" that it be delivered to the consumer under a certain pressure. Such pressure is described in each Statute by the following provision:

> "The pressure of illuminating gas in any service main in the said city, at any distance from the place of manufacture, shall not be less than one inch nor more than two inches and a half."

It will be noted that in the Act of 1906 (the eighty cent statute), the provisions as to candle-power and pressure are both contained in second section, fully quoted on page 5 of this brief.

Each of these Acts became operative the first day of the month next succeeding its passage, a period in each case of about twenty-seven days.

The testimony before the Master disclosed two views as to the practicability of complying with this pressure provision.

All the witnesses for the complainant and some of those for the defendant agreed that it was a physical impossibility to comply with these provisions, owing not merely to natural laws which could not be overcome by any appliances, but also to the fact that the amount of pressure was somewhat dependent upon the action of the consumers themselves. One of the defendants' experts, however, testified that compliance with these provisions was possible, provided that the "entire system of gas distribution in this city be reconstructed", and new and larger mains be laid with new pumping stations and other special apparatus.

Both the Master and the Circuit Court accepted the theory of defendants' experts that compliance was physically possible, if radical changes were made in the method of distribution. The complainant had 800 miles of mains which were valued on the basis of cost of duplication at over $12,000,000. The Master concluded that to install the new pressure mains would involve a cost

> "in the neighborhood of $4,000,000 for main and valve construction alone, in addition to which would be required pumping stations and apparatus, the annual charges and operating expenses in connection with which Mr. Addicks testified would amount to several cents per thousand feet of gas and which would involve a corresponding increase in operating cost or *proper selling price of gas.*"

The Circuit Court in its opinion fully sustained this conclusion. It said:

> "On this point I think the testimony amply supports the Master's finding, which is in substance that the pressure re-

quired by law is not physically impossible if the entire system of gas distribution in this City be reconstructed. It is a scientific fact incapable of change even by legislation, that pressure in a gas pipe varies with altitude. By the expenditure of about $4,000,000 for construction of mains and valves alone, exclusive of any pumping stations or other apparatus, it might be possible to establish and maintain the pressure called for by these Acts. Such a thing is commercially impossible, and even if it were done (of course at complainant's expense) it remains commercially impossible since the other parts of the statutes cut off the surplus income out of which alone complainant could be expected to perform the work. A change by means of new capital would be impossible because when made it would not add a dollar to income."

In its final decree the Circuit Court said (Record, Vol. I., p. 433):

"IV. The pressure required by said two Acts and the order aforesaid is not physically impossible if the **entire system** of gas distribution in the City of New York **be reconstructed; but compliance with such requirement is commercially impossible under the rates for gas prescribed by said two Acts and order.**"

The testimony upon this question of pressure is fully reviewed in Mr. Matthewson's separate brief on the facts. It suffices for the present discussion to say that four conclusions from the testimony were undisputed and indeed indisputable.

1. Assuming that compliance with the pressure provisions was practicable at any time or by any method, it would involve the expenditure of at least $4,000,000, a substantial increase in operating charges and a reconstruction of the Company's distributing system throughout the city.

2. That such compliance was physically impossible before the Act became operative and the penalties for non-compliance accrued.

3. That such increased fixed charges and operating expenses

could not be incurred under the Eighty Cent gas rate, and leave a fair return.

4. The penalties for failure to comply

> " would aggregate $5,000 per diem upon evidence recorded at each of the five city testing stations, of only a single violation per diem of said laws, or at the rate of $1,800,000 per year under complainant's distributing system as now existing and in operation which amounts are liable to be increased by additional or more frequent tests". (See Findings of the Master, *ante*, pp. 11 and 12).

In the Court below no attempt was made by counsel to dispute these conclusions of the Master and the Circuit Court. The unconstitutionality of the pressure provisions was virtually conceded. In the present briefs, only a perfunctory attempt is made to question these findings, and the Appellants rely upon the contention that, if unconstitutional, the pressure provisions are severable from the maximum rate provision.

Mr. Whitney, it is true, attempts to evade the whole question by a suggestion (p. 150) that he is "informed" that "the State" (which he does not represent) "never relied upon the testimony of Edgerton", (who testified as to the practicability of larger mains for the purpose indicated,) but upon the testimony of Mr. Bradley, the Chief Engineer of the Consolidated Gas Company. Mr. Bradley, however, testified that compliance with the pressure provisions by any method was a physical and scientific impossibility. (Vol. I., p. 549 of the Record).

The only question, therefore, open to discussion is whether this pressure provision is so severable from the maximum rate provision that the Court can eliminate it as invalid, without nullifying the maximum rate provision.

To show how interwoven the subject of price, quality and pressure are, we first call attention to the statutes themselves, the pertinent provisions of which we have already quoted (*supra*, pp. 3-5). Each statute presents a *single* "standard" of gas, whose

three interdependent elements are price, candle power and pressure.

It is obvious that the price, the candle power and the pressure were interdependent. As to candle power, this could not possibly be denied, for the higher the candle power necessarily the greater the cost, and the Legislature necessarily in fixing the maximum price of gas inseparably connected with it the quality of gas that was to be delivered. Equally interwoven with the price of gas and candle power was the requirement as to pressure, about which latter there had been some public complaint. The reports of the legislative committees clearly show, and the statutes themselves corroborate, that the Legislature was at least as much concerned in compelling the Company to observe a certain minimum and maximum pressure in its mains as it was to furnish gas of a certain candle power, and it presumably but erroneously believed that both could be furnished without injustice to the complainant at the maximum price which it prescribed. The brief for the Public Service Commission admits (p. 281)

> "That the pressure provision was intended for an additional guarantee to the consumer in order that the candle power provision should not be evaded by increasing the pressure."

It was therefore an integral part of the candle power provision and of the *standard* of gas which the Company should sell for 80 cents.

In fixing the price of gas of a special quality and pressure the Legislature must have considered, as integral factors in the problem, the burdens of expense thereby imposed upon the Company.

It now appears that even if 80 cent gas were otherwise compensatory, it would be confiscatory, if complainant has the added burdens of new fixed charges and increased operating expenses, necessary to comply with the pressure provisions. As the Circuit Court pointed out in its opinion, the great additional expenditure, due to a radical reconstruction of the mains and pumping stations,

would yield no additional income, as no additional charge for gas to compensate for vastly increased fixed charges is permissible under the present Statutes.

While the Courts may hold portions of a Statute valid, while invalidating others, the portions must be clearly separable, and upon the face of the Statute it must be reasonably clear that the legislature would have separately enacted the valid portions. The burden is upon him, who seeks to disentangle the valid from the invalid portion of an unconstitutional statute, to satisfy the Court that the Legislature would have enacted the valid portion as a separate law. The presumption is otherwise. (See cases cited and quoted, *post*, pp. 43–45.)

We fail to see how this Court can hold that the Legislature would have prescribed the maximum rate, even though the pressure provisions were eliminated. It would be as reasonable to claim that if gas of the required candle power could not be furnished at 80 c., that such standard of candle power would be treated as separable and the 80 c. rate held valid, without any legislative conditions as to the quality of the gas to be sold. The Gas Commission showed how interwoven candle power was with price by allowing an increase of 1.81 to the operating cost as compensation for raising the candle power from 20 to 22. (Whitney's Brief, p. 180.) The Court below has found that gas of twenty-two candle power cannot be sold at 80 cents and yield a "fair return." There is and can be no contention that the Court could emasculate from the Act the provision as to candle power to save the maximum charge. *If it cannot do so as to candle power, how can it do so as to pressure, which also was an element of the quality of the gas to be delivered to the consumer.*

If the Legislature should provide that hereafter the Consolidated Gas Company should furnish acetylene gas to the public at a given price and to do this it was necessary to reconstruct its whole plant, the Court, if it reached the conclusion that such an Act was confiscatory, would be unable to determine whether the Legislature would have preferred to drop the provision requir-

ing the acetylene and retain the maximum price or whether it would have preferred to drop the maximum price and insist upon the acetylene. Of necessity the entire Statute would fall. Similarly, if the Legislature should provide that a railroad should run trains from given points, at not less than fifty miles an hour and that the maximum charge for such express service should be so much per mile, if it were shown that such a speed requirement imposed a burden that was confiscatory, the Judiciary could not determine whether the Legislature would drop the minimum rate of speed or the maximum price.

We earnestly submit that it is equally true that as the Legislature has required by Section 2 of the Act of 1906 (*supra*, p. 4) the complainant to sell and deliver gas of a certain candle power and with a certain pressure at the price specified in Section 1, and as it is substantially conceded that this is at the present time a physical impossibility and that it would be at any time a commercial impossibility with the maximum price prescribed for the sale of gas, this Court cannot safely determine whether the Legislature would have retained the pressure provision and to that end increased the maximum price of gas, to make compliance possible, or whether it would have retained the maximum price of gas and eliminated the inconsistent pressure provisions. Even if the Court could separate the question of price from pressure, yet how can it separate from Section 2 of the Act of 1906 the provisions as to candle power and pressure? *Non constat*, that the Legislature would have preferred to reduce the candle power (as in Boston) to 16 and have retained the pressure provisions. The only safe course for the Judiciary is to leave to the Legislature the task of reconstructing its unconstitutional legislation and determining for itself which of several incompatible provisions it will re-enact as the public policy of the State.

The legislative history of the statutes clearly shows the interdependence of the provisions as to pressure and price and the importance attached by the Legislature to the question of pressure.

The relation of pressure to the cost of gas had been the subject of investigation as early as 1885, and the legislative investigating Committee of that year investigated the subject, as did the later Legislative Committee of 1905, whose recommendations were embodied in the legislation now under attack. Its report clearly shows that the Committee of 1905 believed that the price of gas was necessarily interwoven with the question of candle power and pressure in the mains, by each of which it was believed that the cost to the consumer would be increased or lessened. The Committee recommended as follows:

> "From the evidence which has been presented we are satisfied that a price of seventy-five cents per thousand cubic feet will be fair to the consumer, and will afford to the Companies *after allowing the proper costs for manufacture and distribution taking into consideration all the elements of such cost*, a reasonable return upon their capital investment in their gas making business. This applies to the Borough of Manhattan, the Borough of Brooklyn and a large part of the Borough of the Bronx. In our opinion, it would not be just to make such a rate applicable to the more sparsely settled sections of the City of New York, in, which owing to local conditions, the cost of manufacture and distribution is necessarily higher.
>
> *The investigation has shown clearly that by increasing the pressure a quality of gas poorer than the standard required by law may be made to furnish a required degree of illumination, thus entailing an increased consumption at the increased cost to the consumer. In order that the consumer may benefit by the reduction of the price of gas, it is important that the degree of pressure should be effectively regulated.* The evidence has also shown that there is at present no official inspection in any borough of the city except Manhattan and that the inspection in the last named borough is too infrequent to be adequate. Provision should be made for a system of inspection insuring a supply of pure gas in accordance *with the legal standard* and its accurate measurement at the meter. This inspection should be made by officials of the city at the City's expense."

As a result of and *pursuant to these recommendations* the Acts of 1905 and 1906, whose constitutionality is now assailed, were passed by the Legislature. When chap. 737 of the Laws of 1905 was passed, which created the Gas Commission and which was intended to legislate comprehensively for the gas situation, it gave the Commission, *inter alia*, the following power :

> "3. Fix the standard of illuminating power and purity of gas manufactured and sold by persons, corporations and municipalities for lighting purposes, not less than that prescribed by law, and require the gas so manufactured and sold to equal the standard established by law or by it, *and establish a standard of pressure at which gas shall be delivered*, where such standard is not otherwise prescribed by law."

It is clear, therefore, why the Legislature were so careful in prescribing the price of gas also to prescribe *as integral parts of the same "legal standard,"* the candle power and the minimum and maximum pressure.

For the purposes of this argument, it is, however, not important whether the Stevens Committee or the Legislature regarded the two factors as interdependent with the price of gas, *if in point of fact they were thus interdependent*, and it is the undisputed evidence in this case that compliance with the Statute will involve the expenditure of many millions of dollars, which, as found by the Court, is rendered impossible by the very "*rates for gas prescribed by said two Acts and Order*". The Legislature therefore has, under the findings of the Court, required the Company to do simultaneously two things which it is impossible to do concurrently.

The Company is directed, simultaneously, to reduce its revenues by a stupendous sum and increase its fixed charges to a very considerable extent. This the Court finds to be, with the statutory rates now prescribed, "commercially impossible", which fairly implies that to observe the Statute would not merely

confiscate the earning power of the corporation but involve it in almost immediate bankruptcy and financial ruin.

This Court is under no obligation to determine for the Legislature which of two impossible alternatives is to be eliminated. *Non constat* that the Legislature may not prefer to retain the old maximum price of $1 to enable the complainant to reconstruct its plant; *non constat* that it may not prefer to repeal the provisions as to pressure in order that the price of gas may be reduced. How can this Court, without embarking upon a sea of conjecture, without chart, compass or rudder, determine what the Legislature will do in view of conditions which it is apparent it did not forsee?

We fully accept the decisions cited by the learned counsel for the Appellants, but they do not sustain the severability of the provisions in question. They rely principally upon the following decisions of this Court:

Pollock v. Loan Co., 158 U. S., 601;
Employee's Liability Cases, 207 U. S., 463, 501;
Field v. Clark, 143 U. S., 649;
McPherson v. Blacker, 146 U. S., 1;
Baldwin v. Franks, 120 U. S., 685;
Huntington v. Worthing, *id.*, 97;
Allen v. Louisiana, 103 U. S., 80.

In Pollock vs. Farmers Loan Co., 158 U. S., 601, the Court, quoting with approval Poindexter vs. Greenhow, 114 U. S. 270, said:

> "'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; **but these are cases where the parts are so distinctly separable that each can stand alone, and where the Court is able to see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail.** To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact.'"

In the more recent Employers' Liability Cases, 207 U. S., 463, 501 (1908), where a Statute provided a rule of liability in case of negligence for all carriers who are engaged in interstate commerce, but did not confine its operation to accidents happening in the course of interstate commerce, the Court thus stated the rule:

> "Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save **the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated.** All these principles are so clearly settled as not to be open to controversy."

In Field v. Clark, *supra*, the Court said:

> "It is an elementary principle that the same Statute may be in part constitutional and in part unconstitutional *and that if the parts are wholly independent of each other*, that which is constitutional may stand and that which is unconstitutional will be rejected."

And again:

> "It is only when different clauses of an Act are so dependent on each other that it is evident the Legislature would not have enacted one of them without the other—*as when the two things provided are necessary parts of one system*—that the whole Act will fall with the invalidity of one clause. When there is no such connection and independency, the Act will stand though different parts of it are rejected."

As it has been shown that the Legislature had in mind that the question of price to the consumer was interwoven with the question of pressure and candle power, how can it be said, in the language of Field v. Clark, that "*the parts are wholly independent of each other*," and is it not clear that pressure, candle power and price are "*necessary parts of one system*," by which the reasonable cost of gas is determined?

In Allen v. Louisiana, *supra*, this Court quoted with approval the following language of Chief Justice SHAW, in Warren v. Mayor, 2 Gray (Mass.), 84:

The severability of different portions of a Statute is a question of construction, and as in this case a New York Statute is being construed, the New York decisions should be controlling. These decisions strongly support our contention that the pressure provision is not severable from the body of the Statute. See

People v. Porter, 90 N. Y., 68;
Trustees Saratoga Springs v. Gas Co., 191 N. Y., 123.

In the last named case, the full power of the Gas Commission to fix maximum rates for gas was nullified because the Legislature had made the rate permanent as to the Gas Company and subject to revision at the instance of the consumer *(ante*, p. 17). Although the permanence of the rate was a mere incident to the general scheme of rate regulation, and could have been eliminated without destroying the machinery of such regulation, yet the Court of Appeals declined to speculate as to whether the Legislature would have retained any power to fix rates by a Gas Commission, if it had known that it could not constitutionally make the rate permanent as to one class and not permanent as to the other.

attempts to answer our contention by the following remarkable suggestion:

> "When complainant has made the investment necessary to enable it to comply with the pressure regulation and has thereby devoted additional property of definite value to the

> public use, and it should find that the rate prescribed by the Statute did not yield it a fair return on its total investment, then, under the 'changed circumstances' brought about by its new investment, it might make a new application for relief."

To this objection there are two obvious replies.

The first is that the Legislature has not given the complainant time to reconstruct its entire distributing system and then comply with the pressure provisions. It required that there should be compliance with each of the Acts on the first of the month following its passage, and this gave the complainant twenty-seven days to reconstruct its entire system of mains and to introduce other complicated and expensive machinery. Had this mandatory provision been unaccompanied by drastic penalties, its immediate enforcement would not have been serious, but, as previously stated *(supra*, pp. 11-12), the Act provides that each time, obedient to the laws of gravitation, the complainant exceeds the pressure, it becomes indebted to the State in the sum of $1,000 and, as found by the Master and not disputed by the Appellants, this would mean, if the Company only exceeded the maximum one time each day, a daily fine of $5,000 and an annual loss of $1,800,000. Can it be said, therefore, that the complainant is *premature* in asking relief, when the Legislature has been premature in punishing the complainant for its inability to do that which is, for the time being and for a long time to come impossible?

Even if the complainant has an abstract legal right to apply for relief, after it has made the necessary expenditure to reconstruct its entire system, yet the legislation has made it impossible to make such expenditure. The present rate for gas is a legislative rate without any limitation of time. It yields a return which, after paying expenses, returns less than 6% upon the value of the property. To destroy its present distributing system and build a new one, it would be necessary to incur new debts or increase its capital stock. It can do neither without

he consent of the Public Service Commission, and if it obtained such consent, it would, under the circumstances, be unable to find the means to meet the additional fixed charges thereby occasioned without destroying entirely the small return. As its income cannot grow any larger under the legislative rates, how can it increase its expenses, without destroying the little that remains, for when reconstructed, the Company would receive no additional income whatever from its great additional expenditure. The Company is thus invited by the Attorney General to destroy the little earning power it still has, and then "apply for relief" either to the Legislature or the Courts. It may be safely said that while the Legislature progressively reduces maximum charges for gas, it never increases them, and the abstract right of an appeal to it "for relief" would be too hazardous to finance the new undertaking. The Court was therefore right in finding that such a suggestion was commercially impossible *and made so by the very maximum charges now under consideration.* Maximum rate charges are never retroactive. The Company is therefore under no obligation to bankrupt itself first and then ask either the Legislature or the Court to make good the loss.

The further and complete answer to the Attorney General's suggestion, however, is that the mandate of the Legislature, fortified by drastic penalties, is not that the complainant shall at some future time and under a different scale of rates reconstruct its entire distributing system, but that it shall *with the rates now prescribed and with the system as now constructed immediately to do that which, by reason of the system of distribution and the maximum rates of gas permitted the Company, is both physically and commercially an impossibility.*

While, for purposes of argument, we have assumed that compliance with the pressure provisions was abstractly a physical possibility, yet the Appellee's contention was and is that compliance with these provisions, now or at any future time, with or without the expenditure of many millions of dollars, is by reason of natural laws, which cannot be wholly overcome, a physical impossibility.

IV.

The provisions of said acts as to penalties are unconstitutional on their face and invalidate both statutes.

No serious attempt was made in the Court below, and we believe none will be made in this Court, to justify these penalties, which the Master, with ample justification found to be "UNEXAMPLED IN EXTENT AND SEVERITY." The effect upon this Company of an enforcement of these penalties, if it charges in excess of the statutory rates, is clearly stated in the supplemental findings of the Master, and has been already quoted (*supra*, pp. 10, 11).

In Cotting v. Stock Yards Co., 183 U. S., 79, Mr. Justice BREWER expressed his conviction that such penalties operate as a denial of the "equal protection of the laws" and what was merely *dictum* in that case became the SETTLED DOCTRINE of this Court in *Ex parte* Young, 209 U. S., 123. In that case, Mr. Justice PECKHAM said:

> "*A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.*

It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event.

In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event."

In the Court below, the Appellants attempted to sustain the constitutionality of these penalties upon two grounds:

1. That they were not cumulative.

2. That they were not more severe than penalties provided in other Statutes.

We have already discussed the first ground and shown that by the plain letter of the Statutes and under the accepted decisions of the Courts of New York these penalties are unquestionably cumulative. No other conclusion is reasonably possible *(supra*, pp. 23–27).

As to the second objection, we are referred to instances of higher penalties for acts, which in their very nature could be committed on comparatively few occasions. Thus we are referred to the penalty for usurious interest, the failure of an insurance company to file a report, the failure of a tax-payer to pay his taxes, the failure of a corporation to submit its stock books to the inspection

of stockholders, and similar cases. It is plain that in those cases the aggregate of the penalties could only be small; whereas, in the very nature of maximum rates, as applied to public utility corporations, the penalties for charging in excess of the maximum rates must of necessity be oppressive in amount and must inevitably deter the corporation from asserting its constitutional rights unless it can have the Federal Courts as a "city of refuge" and the Fourteenth Amendment as a rock of defense.

The only question which seems to us open to discussion is as to the effect of such oppressive penalties upon the Statute, whose provisions they seek to enforce. We admit that the severability of the penalty provisions from the maximum rate is more debatable than the question already discussed of the interdependence of the maximum pressure provisions and prices; nevertheless, we believe it to be a logical conclusion that where a Legislature enacts a scale of rates and as to such rates denies the corporation equal access to the Courts by holding stupendous penalties over it *in terrorem*, the Statute *as a whole* denies the equal protection of the laws and not merely the penalty provisions. We so understand this Court in *Ex parte* Young, *supra*. Referring to the italicized portion of Mr. Justice PECKHAM'S opinion, which we have already quoted (*supra*, (p. 48), it would seem that the Court spoke of the law as a whole and not merely of the penalty provisions, although in a subsequent part of the opinion this conclusion is not so clear.

In previous cases, the Court had already held that where maximum rates were provided and no opportunity was granted for a judicial review of the reasonableness of those rates, the law as a whole was unconstitutional.

Thus, in Chicago Ry. Co. vs. Minnesota, 134 U. S., 418, the Legislature of Minnesota passed a law which provided that for certain railroad rates, which should be "final and conclusive as to what are equal and reasonable charges." The State Court granted a writ of mandamus against the appellant railroad to compel it to comply with the law, and the railroad company set up as its answer

that the rates were unreasonable. Testimony to support this defense was excluded by the State Court, and on appeal the Supreme Court held that the mandamus granted by the Court below should be dismissed "if the Court should adhere to its opinion that [illegible]

We repeat our contention (*ante*, p. 17) that in determining the severability of the penalty provisions, the decisions of the New York Courts will be controlling upon this Court, and these decisions leave no doubt that the New York Courts would hold that the penalty provisions were not separable from the maximum rate provisions (See cases cited, *ante*, p. 17).

In People v. Porter, 90 N. Y., 68, the Act created inferior magistrates and also contained provisions which provided penalties as to punishment for crime. It was held that the invalidity of the provisions for the appointment of the inferior magistrates invalidated the penalty provisions. Said Chief Justice ANDREWS:

> "We cannot assume under these circumstances that the Legislature would have passed the Act except as a whole, and if the part relating to the appointment and jurisdiction of the police justices are invalid, the whole Act fails."
>
> See Saratoga Gas Case (*ante*, p. 17).

[illegible] the sale of gas in New York City, was $1.00 per thousand, and this rate had been acquiesced in by the gas companies (including the complainant). Thereupon the Legislature, by the Act of 1905, above referred to, provided that all gas sold by the complainant and other New York companies to the City of New York should be at a rate not greater than 75 cents per thousand. Since the passage of that Act it has provided, by

order of the Gas Commission, passed in pursuance of the Act of Chapter 737 of the Laws of 1905, and by the direct mandate of Chapter 125 of the Laws of 1906, that the price of gas to the individual consumer shall be 80 cents per thousand. Whether, therefore, consideration is had to the conditions that preceded the passage of Chapter 737 of the Laws of 1905, or those that succeeded, it appears that by law the complainant is compelled to sell its gas to the city of New York at a less rate than it is permitted to charge to other consumers, notwithstanding that the ordinary rate is presumptively reasonable. (See Lake Shore R. R. Co. vs. Smith, 173 U. S., 684, quoted *post*, p. 53).

It has, as every corporation and individual, the liberty of contract guaranteed by the Fourteenth Amendment (Lochner v. N. Y., 198 U. S., 53; Allgeyer v. Louisiana, 165 U. S., 589). The State, therefore, has no general and *unlimited* right to interfere between the producer and the consumer as to the price upon which they would otherwise mutually agree, and while, as to public utility corporations the supervisory power of the State, subject to the guarantees of the Constitution, has been recognized since Munn v. Illinois, yet the State, when it seeks to interfere with the rights of property and the liberty of the citizen to contract for the sale of the products of his labor, **only has power to prevent extortion by maximum charges of general and uniform application.**

It has been expressly held by this Court that under the police power to regulate rates, the State is without power to direct a public utility corporation to sell to one customer at a less price than to another. Its power to step between the public service corporation and its customers is exhausted when it fixes a **general and uniform** maximum price for the public service. It is as powerless to distribute unequally the burdens of such service as it is to direct a corporation to exempt one class of the community from any burden and to impose the entire expense upon another class.

Such is the undoubted doctrine of this Court, as declared in the case of Lake Shore R. R. Co. v. Smith, 173 U. S., 684. In that case

it was contended that the power to discriminate was incident to the power to regulate. This Court denied this contention and said:

> "It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of the lesser right which is included in the greater one, to fix by Statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and **without discrimination** in favor of or against any individual; it is the power to declare a **general law** on the subject of rates, beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success."

In that case, the Legislature of Michigan passed a law that one thousand mile tickets should be sold by the railroad company, for the benefit of the purchaser and his wife and children, and this was held to be a violation of the Fourteenth Amendment, on the ground that such discrimination between different classes of consumers was not within the police powers of the State. The Court further said:

> The power of the Legislature to enact general laws regarding a company and its affairs does not include the power to *compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation.* * * *
>
> If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law, making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. * * * *The legislature, having fixed a maximum rate at what must be presumed, prima facie, to be also a reasonable rate,* we think the company then has the right to insist that all persons shall be compelled to pay alike,

that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper **and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law."**

The doctrine of Lake Shore v. Smith (*supra*) is in no respect modified by the Interstate Street Ry. v. Massachusetts (207 U. S., 79), where a street railway company was chartered subject to all existing laws relating to street railway companies, and among such *pre-existing* laws was one that required the conveyance of school children at half price. Mr. Justice HOLMES, in his opinion, says:

> "A majority of the Court considers that the case is disposed of by the fact that the Statute in question was in force when the plaintiff in error took its charter and confines itself to that ground."

The case having thus been decided, Mr. Justice HOLMES, "speaking for myself alone," discusses the possible application of the amendment and "hesitatingly" agrees with the Massachusetts Court that the legislation was not necessarily invalid. It is apparent from the opinion, therefore, that a majority of the Court declined to affirm the validity of the Statute on that ground; and we further believe that the *dictum* of Mr. Justice HOLMES was not intended to express his personal dissent to the doctrine of Lake Shore v. Smith, as he does not even refer to it.

That a municipality is no exception to this rule of equality in rates is decided by the case of Wilson v. United Traction Co., 72 App. Div., 233, where a New York statute was under consideration, which required any city railway to transport a policeman or fireman in the employ of the municipality, free of charge, *while such em-*

ployee is travelling in the performance of his duties. In this case, the Court, while conceding that under the police powers a service railway might be required to *carry* such public officers, held that it was no part of the police powers to carry them *free of charge.* The Court said:

> "Such an advantage may be a public convenience, but the right to take the property of the individual citizen or of a class for the sole reason that the proceeds of it would be convenient to aid the municipality in defraying its general expenses, has not been yet conceded as a legitimate exercise of the police power, and we are not disposed to concede it now."

By analogy, we submit that while the State is competent to compel the complainant to furnish gas to the municipality, it cannot be compelled to furnish it free or at any less rate than to other consumers.

In Beardsley v. R. R. Co., 162 N. Y., 230, the Court of Appeals of this State considered the constitutionality of Chapter 1027 of the Laws of 1895, which required the issuance of mileage books, and the Court, on the authority of Lake Shore R. R. Co. v. Smith *(supra)* held that the statue was invalid.

The city is no exception to the rule as thus laid down, which forbids excepted classes in maximum rate laws. It cannot claim, as matter of right, that it should receive its gas at a less rate than any other consumer. In giving assent to the use of its streets, it might have stipulated with the corporation for gas for municipal purposes at any price. Having given such use, it cannot afterwards insist that it should have gas more cheaply than any other consumer. In the brief of the Attorney General for the Appellants it is suggested that because either the Legislature or the City could, in granting their respective franchises or permits, have made a contract with the Gas Companies as to a special rate of gas for the City, therefore it has equally the power to do so now. This is an obvious *non sequitur.* If the Legislature or a municipality can

impair its contract with a public service corporation by subsequently injecting new conditions, then such contracts are unilateral arrangements and of no value or protection. *Indeed, the City has made no such claim by any legislation.* The enforced reduction is an act of the State legislature, which has arbitrarily intervened between the complainant and its consumer.

A city, in contracting for a supply of gas for corporate purposes, acts as a private corporation.

Smith v. Brooklyn, 160 N. Y., 357;
People v. Coler, 166 N. Y., 120;
Western Fund Co. v. Phila., 31 Pa., 175, 183.
Bailey v. New York, 3 Hill, 531;
Byrne v. Cohoes, 67 N. Y., 204;
Lynch v. Springfield, 174 Mass., 430.

It has been broadly held that, where powers are given to a municipal corporation for merely corporate purposes and not for strictly governmental purposes, the city acts as a private corporation.

Missano v. New York, 160 N. Y., 123;
Walsh v. New York, 41 Hun, 299;
Scott v. New York, 27 App. Div., 240.

The rate fixing power is one of prohibition. In strictness, it does not fix rates, but simply provides that any sum beyond a given maximum is unreasonable. In so doing, it in effect declares that the maximum is a reasonable price.

Brooklyn Union Gas Co. v. N. Y., 188 N. Y., 334;
Lake Shore Ry. Co. v. Smith, 173 U. S., 684, 695.

When, therefore, the State provides that as to all other consumers, 80 cents per thousand feet is a reasonable charge, and provides that, as to one consumer, no greater charge than 75 cents shall be made, **it in effect declares that to the favored consumer gas must be sold at less than a reasonable rate. This the State cannot do.**

The appellants may attempt to avoid the controlling effect of these decisions by two suggestions.

The first is that exceptional rates for the city is not a discrimination, for it is the representative of all the citizens.

The second is that as the city consumes gas in larger quantities than the individual, it is entitled to a better rate.

To the first suggestion, the answer is that, while citizens presumably get an equal share of the benefit of public lighting, they do not share *equally* the benefits and burdens which attend the use of gas by both the city and the citizens as individuals. Many citizens of New York, as, for example, the proprietors of hotels, do not use gas at all. The citizens who do use gas and who presumably pay more for its use because the city pays less, are in this way the subject of unfair discrimination.

Mr. Whitney, in his brief for the Public Service Commission (p. 183) suggests in this connection the following justification of this palpable discrimination :

> " If the price of the gas paid by the municipality were raised, the taxpayers would have to pay the difference and theoretically the consumers, who were not taxpayers, would pay their share by way of rent."

This suggestion is too fanciful to be of value. It still fails to distribute equally the cost of gas between the taxpayer and the non-taxpayer, the man who rents his property and the man who owns it, the man who uses no gas and the man who does.

In any event, the case of Wilson v. Traction Co., *supra*, answers this suggestion, because in that case the policeman, whose free carriage on the passenger railway was directed by legislation, was also a servant of the city and his free carriage relieved the public, as a whole, of burdens, and therefore enured to the collective benefit of all the citizens; nevertheless, the Appellate Division held that an ordinance compelling the passenger railways to carry him free " had not yet been conceded as a legitimate exercise of police power," and the Court refused to concede that it was. If the servant of the

city, in one of its purely political or governmental functions, like the keeping of the peace, cannot be the subject of an unfair discrimination, it is true *a fortiori* that the city, in purchasing gas for the lighting of its streets (in which, as stated, it acts as a private corporation) cannot claim any immunity from the rule of "equal rates for all, special privileges to none."

As to the second suggestion, assuming that the State could prescribe a scale of rates graduated by the quantity consumed. As this would be of general application, it would be less objectionable. The discrimination in favor of the city, *as such*, is not based upon the amount it consumes, but because it is the City. Indeed the Lake Shore case, *supra*, squarely rules that there can be no legislative discrimination based upon quantity, for in that case the purchaser sought to buy transportation in "wholesale" quantities and this Court declined to recognize that the party who bought the thousand mile ticket was entitled to any special favor by fiat of the Legislature as against the man who purchased a single ticket for a few miles. It said:

> "The Legislature, having established such maximum as a general law, now assumes to interfere with the management of the Company while conducting its affairs pursuant to and obeying the Statute regulating the rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called *wholesale* rates, a discrimination which operates in favor of the *wholesale* buyer and leaves the others subject to the general rule."

This the Court held to be unconstitutional.

Mr. Whitney, in his brief for the Public Service Commission (p. 183), attempts to justify the discrimination on the ground that "the character of the service is also different". But he simply relies upon the fact that the city consumes more than the individual consumer, and we have shown that a legislative rate cannot discriminate between "wholesale" and retail consumers. If so, the Leg-

islature could discriminate between all of the citizens who purchase gas, for all consume it in infinitely varying quantities. If this be so, why was not the twenty dollar mileage ticket justified as a rate regulation in the Lake Shore Case *(supra*, p. 58)?

Mr. Whitney, however, suggests that some of the gas furnished to the city is "unmetered" (referring to the street lamps), but it is nevertheless paid for per cubic thousand, and the mere method of its measurement is wholly unimportant. The fact is that far from being any ground for discrimination because of any difference in service, in favor of the city, the reverse, if anything, is true, for the Gas Company furnished its gas to the consumer in one place, while the service to the city requires the distribution of gas not only to widely scattered public buildings but to every street lamp throughout the length and breadth of the many thousand miles of streets which compose the City of New York.

The question, however, is not one as to the equitable distribution of the cost of gas, but it is a question of *power* on the part of the Legislature to interfere with the management of the Company in such distribution, and the Lake Shore Case is conclusive that while the Legislature has power to establish a "maximum as a general law," it is powerless to further interfere with the management of the Company by unequally distributing the fair return among the various consumers *(ante*, p. 53).

Unless it can be shown that the Lake Shore case has been reversed, the unconstitutionality of the 75c. rate necessarily follows, and the only question open for discussion is as to the effect which such invalid rate has upon the general maximum charge of 80 cents.

In this connection it will be noticed that in enacting the 80 cent law, the Act of 1906 contained a direct exception of the city of New York, which should still have the 75 cent rate, and thus the two rates were made a part of the same scheme of rate regulation. The two rates are thus interdependent. Each must be presumed to have been enacted in view of and with respect to the other. Both form a system of maximum charges and the invalidity of the one is fatal to the validity of the other.

This Court cannot say that the Legislature of New York would have made the rate 80 cents to the individual consumer if it had known that it could not make an exception in favor of the City. The two charges are inseparable parts of the same Act, and one cannot be eliminated and the balance of the law sustained, without compelling the Court to guess at what would have been the intention of the Legislature, if this want of constitutional power had been recognized. The two charges are parts of a *single system of charges*, and when one is eliminated, the Court is left to float without rudder or compass upon a wide sea of conjecture as to what the Legislature would have done with the other charge. To quote again the language of the Supreme Court, in Pollock v. Farmers' Loan (158 U. S., 601) (*ante*, p. 43), an unconstitutional statute cannot be sustained *in a mutilated form*, unless it clearly appears that

> **" the parts are so distinctly separable that each can stand alone and where the Court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforcible, even though the other part should fail."**

In many cases where a single act deals with many clearly separable matters, such separation is free from difficulty; but in the matter of fixing rates, the ways of a Legislature are like those of Providence " mysterious and past finding out ", and the relation of one rate to another is beyond the wisdom of the Judiciary to fathom. Its only safe course is to pronounce an unequal system of rates void as an entirety, leaving the Legislature to reenact it in such form, as will show at least a passing respect for constitutional limitations.

The cases cited by Mr. Whitney in his brief (pp. 185, 186) were all different charges for services which differed in *kind* as well as extent.

VI.

The finding of the Circuit Court that the rates prescribed would yield the complainant less than a just and reasonable rate of return is a finding of fact and not a conclusion of law, and this Court should therefore give to such finding the controlling weight of a special verdict of a jury and not reverse such finding except for clear and indubitable error.

The learned Master, after full consideration of all the testimony, found that the rates would not yield a "fair or reasonable return on the value of the property." In so doing it incidentally found that

> "a just and reasonable rate of return upon the value of the investment in complainant's gas business is **not less** than the legal rate of six per cent. per annum."

The Circuit Court found that six per cent. was

> "the **lowest rate** which, in the City of New York, can be considered legislatively fair to those who are already engaged therein and cannot readily escape."

This conclusion was thus embodied in its final decree:

> "The **lowest rate** of return which can be considered legislatively fair, just or reasonable upon the value of the property employed by complainant in the business of manufacturing and supplying gas is six per cent., at which conclusion the Court has arrived in part by taking judicial notice of local conditions in the City of New York."

It is of primary importance to determine whether this be a question of fact or of law. We contend that it is a finding of fact. Undoubtedly it is a question of law whether, under this finding of fact, the Fourteenth Amendment invalidates the legislation, but the ascertainment of what is a just and reasonable return upon a given investment is of necessity a question of fact.

In his brief for the appellants, the Attorney General frankly admits (p. 22) that the question whether the legislative rates are reasonable presents "*issues of fact.*"

Mr. Whitney, in his brief for the Public Service Commission, (p. 160) also admits that the question was one of fact by the following concession:

> "Here there was but one *ultimate question of fact* before him, namely 'under the conditions existing on May 1, 1906, what rate of return can be earned at the rate of 80 cents for gas by a Company reasonably capitalized and properly equipped and managed.' Every other question was *evidential, not ultimate.*"

The recognition by this Court that the reasonablenesss of return is a question of fact is shown by the statement of this Court in Covington Turnpike Road Company v. Kentucky (164 U. S., 578), when it said that an Act could not be declared unconstitutional (p. 596),

> "merely because the Company (as was alleged and as the demurrer admitted) could not earn more than four per cent. on its *capital stock.* It cannot be said that a corporation is entitled, as of right and without reference to the interests of the public, to realize a given per cent. upon its capital stock".

It is significant that the Court thus concluded its reasoning (p. 597):

> **"Each case must depend upon its special facts."**

The Court thus declined to lay down any rigid uniform rule and recognized that the capital stock and the real value of the Company's assets might not be identical in amount. It has never decided that any given percentage is required as matter of law, even upon real value, for obviously the rate of return in a settled community would hardly be just in a Nevada mining camp, and thus of necessity the question remains one of fact.

The same conclusion is fairly deducible from the pointed analogy which the Supreme Court has drawn between rate regulation cases and cases which involve the actual taking of property under the right of eminent domain. It held that the principles governing compensation were similar in both cases and it is obvious that in a given case the amount to be awarded by the State for property, which it physically takes under the right of eminent domain, is always a question of fact.

It has further recognized that the problem is largely a mathematical one, when it ruled in Chic., M. & St. P. R. R. Co. v. Tompkins, 176 U. S., 167 that the proper practice was to refer the matter to a Master to "make all needed computations and fully find the facts". As was once said of the tariff, the reasonableness of return is of necessity **"a local issue"**, for the compensation for the hazard of capital must necessarily shift from State to State and community to community, in accordance with the economic conditions which there prevail. Many questions of fact further enter into the complex problem—the original cost, the structural value, the reproduction value, the favorable location, the length of the franchises, the possibility of competition, the duration of the business, its good will as a going concern and the rate of similar investments in the same community. These and other purely economic factors enter into the composite result which is, for want of a better term, denominated a "fair return". It must therefore conform not merely to statutory laws but to those laws of business, whose operation, owing to irresistible economic forces, is often independent of Statutes. When, therefore, after a careful examination of these and other factors entering into the problem, a Court of first instance has determined that a given rate in a given case would not yield a fair return, an appellate tribunal is not reviewing a question of law but one which in its last analysis must necessarily be a question of fact.

As such a finding of fact, we respectfully submit that this Court should accord to it all the controlling effect which would be given to a verdict of a jury in a case at law. In the latter case, an ap-

pellate tribunal would not consider whether upon the testimony they would necessarily have reached the same conclusion, nor would it consider whether every detail of the reasoning, through which the ultimate finding was reached, commended itself. It would only reverse the finding if upon the entire testimony it was clearly erroneous.

As previously stated, these findings, reached after so much patient labor and after the fullest opportunity had been given to all counsel to present their evidence or views to the contrary, should be given, under the accepted doctrine of the federal equity courts, *all the force and effect that the verdict of a jury would be given at common law, where there is more than a scintilla of testimony.* Theoretically, the matter should be treated as though all the disputable questions of fact had been framed into specific issues and upon competent testimony a jury had impartially reached certain conclusions. Indeed, the findings of the present Master should be given far greater weight than the verdict of a jury, for the latter would only be the result of the average intelligence of twelve men, drawn at random from the community, who would doubtless have been confused by the intricate and complex facts and possibly swayed by prejudices or interest. (See *Ex parte* Young, 209 U. S. 123.)

In this case, however, the findings are those of a distinguished member of the bar, enjoying, as a Standing Master in Chancery, the special confidence of the Court, and who brought to a discussion of these questions the trained mind of an experienced and very capable lawyer. He was not a mere examiner to take testimony perfunctorily, but in accordance with the practice indicated in C. M. & R. Ry. Co. v. Tompkins, 176 U. S., 180, he had been selected "*to make all needed computations and fully find the facts*".

In Davis v. Schwartz, 155 U. S., 631, 636, an equity suit, the case was referred by consent of parties to a Master "to hear said causes and to report to this court his findings of fact and conclusions of law."

The Supreme Court thus stated the general rule:

> "1. As the case was referred by the Court to a Master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the Court under Rev. Stat., Sect. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, **or so far as there is any testimony consistent with the finding, it must be treated as unassailable."**
>
> 1 Foster's Fed. Prac., Sec. 315, p. 610;
> Green v. Bishop, 1 Cliff., 186, 194;
> Mason v. Crosby, 3 Woodb. & Minn., 258, 269;
> Donnell v. Columbia Ins. Co., 2 Sumn., 366, 371;
> Welling v. La Bau, 34 Fed., 40;
> Moline Plow. Co. v. Carson, 72 Fed., 387, 388;
> Fidelity, etc., Co., v. St. Matthew's Savings Bank, 104 Fed., 858, 860;
> Paddock v. Commercial Ins. Co., 104 Mass., 521, 531;
> Richards v. Todd, 127 Mass., 167, 172.

The weight to be given by the Supreme Court to these findings of the Master is strengthened by the affirmance of the Circuit Court of the substance *and final result* of these findings. While the Master and the Court differed in some details of the calculation, yet in the ultimate finding they agree that the complainant cannot receive, if the statutory rates are enforced, a just and remunerative return.

We submit that this Court should not disturb, except for the clearest error, these careful conclusions of the learned Master, as re-examined and in substance affirmed by the Circuit Court. The Fourteenth Amendment has put a stupendous burden upon the Federal Judiciary in the matter of these rate-making cases, and, so

far as the Supreme Court is concerned, the burden will be intolerable, if it must re-examine as an appellate tribunal the infinitely complicated questions of fact, which are necessarily involved in such cases. We do not claim that there should be no re-examination, but we do claim for the finding of the Court below as to questions of fact the controlling weight in a complicated matter, which would be given to the verdict of a jury in one of extreme simplicity. Possibly Mr. Justice HOLMES, speaking for this Court, had this in mind when he said, in San Diego Land & Town Co. v. Jasper, 189 U. S., 439, 446:

> "We do not sit as a general appellate board of revision for all rates and taxes in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed, together with such collateral questions as may be incidental to our jurisdiction over that one."

In Chicago, M. & St. P. R. R. Co. v. Tompkins, 176 U. S., 167, this Court indicated that the labor of determining the complicated facts in this class of cases should at least primarily devolve upon a Master, and with the enormous growth of this class of litigation, the Supreme Court may sooner or later be compelled, from necessity if not from choice, to apply the law to the facts *as ascertained by the trial Court*, and, as previously stated, this involves no departure from accepted legal principles as to the weight to be given to the findings of a trial Court.

In a very recent and important rate case (Pennsylvania R. R. v. Philadelphia County, 220 Penn., 114), which determined the validity of the two-cent railroad rate law of Pennsylvania, the highest Court of that State took this view of the subject and held that the findings of the lower Court were those of fact and of controlling weight in an appellate court. The Court said:

> "The court below after receiving much evidence and giving it a most painstaking and elaborate consideration found that the Act does injustice to the corporators in that it reduces the returns from the property to such an extent

as to render it unremunerative. *As this is a question of fact the findings of the court cannot be disturbed unless shown to be clearly erroneous*, and as this has not been shown we might well abide by the general rule and rest the case on this finding, but as the method of reaching the fact in a case of such complicated elements is complained of, it is proper to discuss some special objections."

Mr. Whitney in his brief gives a substantial reason why this controlling weight should be given by this appellate Court and indeed by the Circuit Court below, to the findings of the Master. He freely concedes (pp. 57 and 178) that the Master, who saw the witnesses, was in a better position to judge of the weight of their testimony than either the Circuit Court or this tribunal.

On page 57, he disputes the power of a Court to declare a Statute unconstitutional on the impression which witnesses made upon a Master appointed to find the facts. If the question of demeanor be thus important, and in determining credibility and weight of testimony demeanor is, as Mr. Whitney says, of importance, it follows that the very greatest respect should be given to the Master's findings, who had an advantage which neither the Circuit Court nor this appellate Court can possibly have.

Again, on p. 178, Mr. Whitney says in his general attack upon the ability of the judiciary—and especially the Federal judiciary—to dispose of this class of cases:

> "The Judge then finds the voluminous papers piled up among a mass of other papers equally pressing, and he has to decide without the knowledge and experience which aided the Commissioners. Upon questions of fact and discretion he is especially at a disadvantage. He is less likely to know which witness is lying and is more or less misled by a false assertion of impracticability."

If this be true, it follows that this Court has not the same advantage, in weighing the credibility of the testimony in this case, as

the Master. If, as Mr. Whitney says, any of the witnesses were "lying," the Master could determine that better than this Court can, which reads the testimony in cold type.

These practical demonstrations, freely conceded by Mr. Whitney, demonstrate the wisdom of the rule that where the testimony is conflicting, the findings of fact of a Master or jury are virtually "unassailable."

In this case, both the Master and the Circuit Court reached the same conclusion, but not always with the same reasoning as to all the factors of the problem. As previously stated, the Master valued the complainant's property at $83,357,000, while the Court, by eliminating many important property holdings of the complainant and reducing others, reduced the value of its property to $59,831,435. Both valuations were, we think, unjust to the complainant, for we claimed below and claim now that complainant's property as used in the gas business, was reasonably worth over $96,000,000. The Supreme Court, therefore, could not justly overturn the special verdict in this case, because some of the reasoning might not commend itself, unless it was prepared to hold that neither the complainant's claim nor the Master's finding nor the Circuit Court's decree was reasonably justified by any testimony in the case.

In this connection we challenge the soundness of the contention in the Attorney General's brief (p. 23), that as the Appellee did not take an appeal from the decree entered,

> "it will not be heard to challenge the correctness of any of the findings contained therein".

The present decree consists in part of the remedial relief, to which the Court held the complainant entitled, and in part of the findings of fact, which justified such relief, and these findings of fact are themselves divisible into the *ultimate* findings of fact and to those subordinate findings upon which the former were based. Mr. Whitney, in his brief for the Public Service Commissions, admits (p. 160) that the remunerative character of the return is the "ulti-

mate question of fact," to which the other questions were merely "evidential." He further agrees (p. 245) that the whole question is before the Court on his XII Assignment of Error. So far as the remedial relief is concerned, the Appellee is unquestionably bound by the decree and, in the absence of a cross-appeal, cannot be heard to ask for further and different relief. The Appellee took no cross-appeal because it received all the remedial relief which it sought.

As to the findings of fact, which are contained in the decree, whether subordinate or final, we submit that the Appellee has a right to sustain the decree in its favor by any argument that can be legitimately drawn from the testimony, even though such argument may be negatived by one or more of the subordinate findings of fact. The Appellee's position is precisely that of a litigant who claims that a verdict in his favor, and the resultant judgment, is sustained by the testimony in the case. Such Appellee may not agree with all the reasoning of the jury. He may believe that the same result could have been reached by a different process of reasoning; nevertheless, when the sufficiency of the evidence to support the verdict is the question, the Appellee is at liberty to sustain the verdict from the entire testimony in the cause. For example, the present Appellee has the right to show that the Court was in error in eliminating many elements of value, such as the Astoria plant, which, had they been included, would have materially strengthened its right to the present remedial relief.

The cases which the Attorney General cites to the contrary are not in point.

In Chittenden v. Brewster (2 Wallace, 191) the complainant in an equity suit was dissatisfied with the *relief* granted him, and appealed. The defendant took no appeal from the relief granted, but on the argument claimed that no relief should have been granted. The Court held that such failure to appeal from an adverse decree was a waiver of any right to attack its propriety.

The "Stephen Morgan" (94 U. S., 599) was an admiralty case,

where the decree divided the loss resulting from a collision at sea between the libellant and the respondents. Only the respondents appealed. The Court simply held that the libellant, who did not appeal, "cannot be heard in opposition to the decree" but "may be heard in support of the decree *and in opposition to every assignment of error filed by the appellees*".

In Clark v. Killen (103 U. S., 766), Clark filed a bill to declare null and void conveyances of six separate lots of ground. The Court adjudged that *three* of said conveyances were invalid. The complainant appealed because of the insufficiency of the relief as to the remaining parcels and on the argument the Appellee, who had not appealed, attacked the sufficiency of the decree as to the three lots first mentioned. This Court therefore held that he could not attack the decree, from which he had not appealed.

In Cherokee Nation v. Blackfeather (155 U. S., 218), the appellee sought "for a modification of the decree increasing" the award. This the Court denied.

Appellants also cite New Orleans Mail Co. v. Fernandez (94 U. S., 597), but we find no such case reported.

The cases referred to are plainly distinguishable from the case at bar. The Appellee is not questioning the sufficiency of the decree as to remedial relief. It simply contends that such decree is amply sustained not only by the findings of fact, upon which the Court and the Master expressly based it, but upon other facts disclosed by the testimony.

The propriety of that decree must be determined from the whole record and the Attorney General's contention that every reasonable conclusion, which might have been drawn from the evidence in favor of the decree or any part thereof, is to be ignored, finds no warrant in any ruling of this Court.

The unreasonableness of such contention is shown by the fact that the Appellee could not have appealed from this decree. Had it done so, and assigned for error the failure of the Court to find all the facts, which would have *cumulatively* supported the de-

cree, it would have been met by the answer that, as it obtained the only *ultimate* finding which it desired and *full* remedial relief, that the errors assigned were academic. *Indeed, who ever heard of a litigant appealing from a decree, which granted him full relief on the ground that the Court could have reached the same result by different reasoning?*

It has been expressly ruled that a litigant who has obtained

> " a judgment or decree which is so favorable to him that it secured him all the relief he seeks,"

cannot bring a writ of error or take an appeal to review such judgment or decree.

> Guarantee Co. v. Ins. Co., 124 Fed., 170, 173;
> Rogers v. Mining Co., 154 Fed., 606, 609.

Because the Appellee in this case could not have taken a cross-appeal, having secured full relief, it does not follow that he may not fully sustain his decree from the entire record.

The true rule is that an appeal in equity brings the entire case before the Court of review and while the appellant is entitled to his assignments of error, the appellee may defend the decree upon any reason which the record justifies.

In Hendryx v. Perkins, 123 Fed. Rep., 268, 270, PUTNAM, J. said:

> " This is in substance 'that the finding and statement of facts by the Circuit Court' in the case before us is conclusive on us, notwithstanding this is an appeal in a cause in equity and not a writ of error to a common law judgment. * * * For us to admit his proposition * * * would clearly reverse the rules of procedure in the federal courts from the time of Judiciary Act of 1789; and this could not possibly be permitted. It may be well to state here that the law is thoroughly settled that a mere opinion of a judge in the Circuit Court in an equity case is not a 'finding and statement of facts.'"

Both in equity and at common law the true rule therefore is that a judgment or decree will not be reversed unless the appellate court is satisfied upon a review of the entire case that the judgment or decree was erroneous.

McLemore v. Louisiana State Bk., 91 U. S., 27, 28.
Mobile, etc. R. Co. v. Jurey, 111 U. S., 584, 593.
Chic. &c. R. Co. v. Ross, 112 U. S., 377, 395.
Lancaster v. Collins, 115 U. S., 222, 227.
Tua v. Carriere, 117 U. S., 201, 210.
Fulkerson v. Holmes, 117 U. S., 389, 401.

In Blythe Co. v. Hinckley, 111 Fed., 827, 837, the rule was thus stated by Ross, J.:

> " In equity an appeal brings up the whole case, and any matter of law apparent upon the face of the bill of review is upon such an appeal open to the consideration of the Court. If the decree dismissing the bill of review was right, it should be affirmed, regardless of the reasons assigned by the Court for its judgment. Many a right judgment is given for a wrong reason."

VII.

Where the rate is prescribed by the Legislature and not by an administrative body, it is equally subject to a judicial review as to its confiscatory character.

Had this question not been raised by capable and eminent counsel in the Court below, we would have assumed that the proposition was so clearly established by the decisions of this Court that any discussion would be an idle superfluity. In the Court below, however, Appellants contended that

> " the reasonableness of a rate regulation is a judicial question only when prescribed by a subordinate body by virtue of delegated authority."

Subsequently they so far modified their position as to claim that while a legislative rate was subject to review, *if no return whatever were allowed*, it was not the subject of judicial review, if any return, however inadequate and unjust, were allowed.

The logical effect of such contention is that while the Fourteenth Amendment is effective to prevent total confiscation of property by a State Legislature, it is wholly ineffective to prevent partial confiscation. If so, the Fourteenth Amendment, so far as rate regulation cases are concerned, is little better than waste paper, for, as pointed out by the lower Court on the oral argument, it would in such event be easy for the Legislature to regulate rates almost to the vanishing point and thus for all practical purposes confiscate the earning power of a corporation.

If the Courts are constitutionally powerless to review a rate law, which yields one per cent., even though such one per cent. be most unjustly unremunerative, it is then logically true that a rate law would be beyond judicial attack, which would yield one-thousandth of one per cent.

Appellant's contention, however, needs no detailed argument, for it has been conclusively answered by the decisions of this Court, which uniformly have held that no Department of the Government, whether legislative, executive or judicial, can override the Constitution of the United States. Indeed the earlier cases, in which the right of judicial review was asserted, were in many cases legislative rates. The Appellants' contention is therefore best answered without further argument by a few quotations from the opinions of this Court.

In Reagan v. Farmers L. & Tr. Co., 154 U. S., 362, 397, this Court said of this duty of the Judiciary :

> " Still there can be no doubt of their (the Courts') power and *duty* to inquire whether a body of rates *prescribed by a Legislature or a commission* is unjust and unreasonable and such as to work a practical destruction to rights of property and if found so to be, to restrain its operation ".

In Smyth v. Ames, 169 U. S., 466, where a schedule of legislative rates was sought to be enforced, the Court said that the power to regulate was

> " not without limit and that under pretense of regulating fares and rates the *State* cannot require a railroad corporation to carry persons or property without reward ".

The Court summarized the authorities as follows (p. 526) :

> " 2. A State enactment, *or* regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States ".

Again the Court said, anticipating the present contention (p. 527) :

> " No one, we take it, will contend that a *State enactment* is in harmony with that law simply because the *legislature* of the State has declared such to be the case ; for that would make the State legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding."

In Covington Turnpike Co. v. Sandford, 164 U. S., 578, 598, this Court said :

> " The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the *Legislature, when exerting its general powers,* is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public ".

Again in San Diego Land Co. v. National City, 174 U. S., 739, 753, the Court said:

> "It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for the general use; for the State cannot **by any of its agencies, legislative, executive or judicial,** withhold from the owners of private property just compensation for its use."

Again in C. B. R. R. v. Chicago, 166 U. S., 226, 234, the Court said:

> "But a State may not **by any of its agencies** disregard the prohibitions of the Fourteenth Amendment."

And again in Chicago Ry. Co. v. Tompkins, 176 U. S., 167, 173, the Court said:

> "It is often said that the Legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far."

And again, in Cotting v. Stock Yards Co., 183 U. S., 79, 91, the Court said:

> "As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the Court has held that *the Legislature* may not prescribe rates which, if enforced, would amount to a confiscation of property. But it has not held affirmatively that the Legislature may enforce rates which stop only this side of confiscation and leave the property in the hands under the care of the owners without any remuneration for its use."

We concede that in the Granger cases (94 U. S., 113 *et seq.*), where the abstract power of a Legislature to regulate rates at all was alone in question, the Court did say, in 1876, that the rates prescribed by

the State were beyond judicial review and conclusive, but this pure *dictum* was unanimously overruled by the Court in Railroad Commission Cases, 116 U. S., 307, decided in 1886, and this was reaffirmed in Chicago R. R. Co. v. Minnesota, 134 U. S., 418 (1889), in which last case the three dissenting Judges clearly indicated that the majority opinion overruled the Granger Cases. Since then the right of judicial review to prevent confiscatory rates has been uniformly recognized and appellant's present contention, that an Act of the Legislature has some peculiar sanctity to nullify the Fourteenth Amendment, comes a quarter of a century too late.

VIII.

The Fourteenth Amendment invalidates a rate, if it yield less than "just remuneration," even though it yield some return.

Both the Circuit Court and the learned Master found upon the evidence that a just and remunerative return to the complainant could not be less than six per cent. That was found to be an "irreducible minimum." Appellants now contend in effect that even if this be so, the Fourteenth Amendment is inapplicable because there is no confiscation in the constitutional sense, if the return yield *any* compensation to the complainant, however inadequate it may be. As the denial of anything less than a full and adequate return is manifest injustice, the Appellants' contention logically seeks to establish "a twilight zone" of injustice, within which the State can freely confiscate the greater portion of a public service corporation's earning power. In its last analysis, the contention is that while the Fourteenth Amendment is effective to prevent *total* confiscation, it is ineffective to prevent *partial* confiscation.

As applied to the present case, the contention, therefore, is that even if less than six per cent. is a denial of just and adequate remuneration, the Federal Constitution is powerless to prevent partial

confiscation and that the State is therefore, as to legislative rates, in the position of Warren Hastings in his administration of India, in that it can take a substantial part of private property, but is free from interference if it "stop only this side of confiscation" and thereby "marvel at its own moderation". If this be so, as previously stated, the Fourteenth Amendment is of little value, for the Legislature can always exempt itself from the inhibition of the Bill of Rights by allowing the unfortunate public service corporation to retain a small, although grossly inadequate, part of its just earning power.

Mr. Whitney, in his brief for the Public Service Commission (p. 260) is more merciful than his associate counsel and can therefore with greater justice "marvel at his own moderation". While he agrees with them (pp. 258, 267) that there is a "twilight zone of injustice" (the phrase is ours), within which the State can confiscate the just earning power of a public service corporation, without any interference under the Fourteenth Amendment, he yet narrows the zone somewhat by a suggestion (for which there is no warrant or justification in the decisions of this Court) that the limit of Federal power is to give to the much harassed public service corporation the current net rate of interest on a safe non-taxable security of a gilt edge variety. This percentage he fixes at from 3 to 4 per cent., and while he admits that the Company is justly and reasonably entitled to an additional profit, which would represent the "insurance against risk", he thinks such additional profit is beyond the protective power of the Fourteenth Amendment. He admits (p. 260) that this profit, which represents the profit of the risk, is one that the State should not "reasonably" take away under the guise of regulation, but he denies that the Federal Government has any jurisdiction in the matter. He says (p. 259):

> "The State police power may intervene to cut down the NORMAL income of property IN THE MOST SERIOUS DEGREE so long as the property is not 'taken.'"

He admits (p. 261), that this lack of protection under the Fourteenth Amendment puts the stockholders of such a corporation

"to a serious risk—a risk of pecuniary loss by the action of the local authorities—without any real efficient relief". He, however, gives them the soothing balm that "dividends occasionally stop, just as a house sometimes stands empty", and that (p. 262)

> "a State which does not treat its corporations fairly will soon suffer and soon repent, and will not the *education* that it will have received compensate in the long run for the temporary loss that investors will have suffered?"

Of course the drawback to this argument is that the State gets its education at the expense of individual investors and that it is of little satisfaction to the latter, when their just income is destroyed and they are reduced to possible penury, to learn that the people as a whole are somewhat wiser by reason of their (the individual investors') misfortunes.

This ingenious theory also ignores the practical consideration that the public service corporation may have built its works by borrowed money, upon which it is paying far more than the net interest rate on non-taxable securities, and it further asserts the indefensible proposition that there is a substantial element in the "just return," namely, the insurance against risk or profit for the hazard, WHICH THE STATE IS AT LIBERTY TO CONFISCATE. All rates, therefore, according to Mr. Whitney, are like ancient Gaul of our school days, divided into three parts: (1) The confiscatory. (2) The unreasonable. (3) The reasonable.

To support this argument, he makes a distinction between a "taking" of property and a regulation of rates, but as we will hereafter show, the "taking" of property, which is meant in this class of cases is not the taking of the capital itself but the taking of the *earning power* for the supposed benefit of the public.

Indeed this whole question has been somewhat confused by the use of the misleading word "confiscation". There is no such word as "confiscation" in the Fourteenth Amendment. It simply provides not only for the equal protection of the laws in the pursuit of gainful occupation (which equal protection is wanting when the

State can arbitrarily deprive any corporation of its just earning power), but also prohibits the taking of property "without due process of law," which means, unless the uniform decisions of this Court are wholly wrong, that no corporation can be compelled to serve the public without "just compensation" for its service.

This contention of a "twilight zone of injustice", which is as unsound in ethics as it is in law, and as wanting in reason as in authority, finds no warrant whatever in the decisions of this Court.

In Cotting vs. Stock Yards, 183 U. S., 91, this Court said in 1901, of this very contention, that this Court

> "has not held affirmatively that the Legislature may enforce rates *which stop only this side of confiscation* and leave the property in the hands and under the care of the owners without any remuneration for its use."

The rule, as uniformly laid down by this Court, has been one of "just compensation."

The meaning of that phrase, as familiar in legal phraseology as in common speech, is so clear that a volume of words would not amplify its meaning. Compensation means **full** compensation and can mean nothing else, and a man is never compensated when he receives less than that which is due him, any more than the laborer has the payment of his hire when he receives a fractional part thereof. The laborer is worthy of his full hire, and the public service corporation is entitled to full remuneration for the service which it renders. *Nothing more and nothing less.*

The appellant's contention is an inversion and also a perversion of the common law rule as to reasonable rates.

The Granger Cases were simply declaratory of the common law and were based on the *dictum* of Lord HALE, that he whose business is affected by a public interest shall "take a reasonable toll". The Court further quoted Lord ELLENBOROUGH in Aldnutt v. Inglis, 12 East, 527, that those who enjoyed a public monopoly are "obliged to limit themselves to a *reasonable compensation* for such ware-

housing". Compensation, therefore, was the rule at common law, and it is inherent in the very word "compensation" that the hire must be *equivalent* to the service.

In the Railroad Commission Cases, 116 U. S., 307 (1886) decided ten years after the Granger Cases, the Court said that the authority of a railroad carrier to carry persons and property, and to "fix, regulate and receive tolls," **"itself implies authority to charge a reasonable sum for the carriage"**, and added that "this would have been implied if there had been no such provision." In the same case, the Court repudiated the doctrine of Chief Justice WAITE, in the Granger Cases, that a legislative rate was beyond judicial review, and said (p. 331):

> "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry passengers or property **without reward.** Neither can it do that which in law amounts to a taking of private property for public use without **just compensation** or without due process of law".

"Just compensation" therefore became the rule, to which this Court has adhered without shadow of turning. In so doing it used a well recognized legal term of constitutional law, for with only three exceptions, the constitution of every State in the Union provided in substance that private property should not be taken for public use without "just compensation."

The Fifth Amendment uses the same term and the Supreme Court in Monongahela Navigation Co. v. U. S., 148 U. S., 312, 326, thus defines its significance:

> "The noun 'compensation', standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way

of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' **There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent of the property taken."**

Nor as to just compensation is there any sound distinction between the value of capital and the value of its earning power.

In Monongahela Navigation Co. v. U. S. (p. 328), *supra*, the Court further said:

> "How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner."

To the same effect is Mr. Justice FIELD'S vigorous statement in Munn v. Illinois, 94 U. S., which, though contained in the dissenting opinion, became subsequently the accepted doctrine of this Court. He said (p. 141):

> "All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession and allows a deprivation of use and the fruits of that use, it does not merit the encomiums it has received."

From the ruling of "just compensation" as thus stated, this Court has never departed. Moreover, it wisely declined to amplify it by further definition.

In Chicago R. R. Co. v. Minnesota, 134 U. S., 418, 458, it said:

> "If the Company is deprived of the power of charging **reasonable rates** for the use of its property and such

deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus in substance and effect of the property itself without due process of law ".

In his concurring opinion, Mr. Justice MILLER said (p. 461):

" But when the question becomes a judicial one and the **validity and justice** of these rates are to be established or rejected by the judgment of a Court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions ".

Can it be doubted that the " justice " of rates requires full, and not partial, compensation?

Again, in Reagan v. Farmers Loan & Trust Co., 154 U. S., 362, 397, it was said that it was the Court's

" power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is **unjust and unreasonable,** and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation ".

Can it be questioned that an inadequate rate is " unjust and unreasonable," even though it give *some* compensation?

Again the Court said, in the same case (p. 399):

" The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation in whatever form it may be enacted, by which the property of one individual is, **without compensation,** wrested from him for the benefit of another, or of the public ".

In the same case it was held that it was competent for the Courts,

" to enter upon an inquiry as to the **reasonableness and justice** of the rates prescribed by the Railroad Commission ".

Can less than full compensation be in any legal sense in accord with "reasonableness and justice"?

In the same case, this Court pointedly indicated by analogy its recognition that compensation necessarily implied full compensation. The Court said (p. 410):

> "The equal protection of the laws, the spirit of common justice, forbids that one class should by law be compelled **to suffer loss that others may make gain.** If the State were to seek to acquire the title to these roads under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of **just compensation,** that compensation being the value of the property as it stood in the markets of the world and not as prescribed by an Act of the Legislature? Is it any less a departure from the obligations of justice to seek to take, not the title but **the use for the public benefit at less than its market value?**

Applying the analogy, would the requirement of the Fourteenth Amendment be satisfied if the State Court of New York had taken possession of complainant's property under the right of eminent domain and by legislative act given it a grossly inadequate sum therefor? Could it in such case be said with reason that as long as the Legislature allowed it *anything* for its property it had received some compensation and the question as to *quantum* was so far a legislative question as to be beyond judicial review? This Court has itself answered in the negative by this pointed declaration *that* **"just compensation" in rate regulation cases is "just compensation" in condemnation cases.**

In Smyth v. Ames, 169 U. S., 466, the Court, reaffirming the Railroad Commission Cases, again held that no public service corporation can be obliged to discharge its public functions "without reward" or without "just compensation", and thus again used the language of the Constitution, as already interpreted in the Monongahela Bridge Case, *supra*, as meaning **full compensation.**

In Covington Turnpike Co. v. Sandford, 164 U. S., 578, 598, the Court held that a public service corporation had the right to require rates that were "just both to it and the public", and this it later defined in the opinion as **"the fair value of the services rendered".**

Again, in Smyth v. Ames, 169 U. S., 466, 547, it summed up the rule as follows:

> "What the Company is entitled to ask is **a fair return upon the value** of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Could the rule of full compensation be more clearly stated? To conform it to appellant's contention, it would be necessary to paraphrase it thus:

> "What the Company is entitled to ask is some return, however inadequate, upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that as little be exacted from it as will be required to pay expenses and make some return, however small and inadequate, to the Company for the use of its capital and the employment of its skill".

In San Diego Land Company v. National City, 174 U. S., 739, 757, the Court thus stated the rule:

> "What the Company is entitled to demand in order that it may have just compensation, is **a fair return upon the reasonable value of the property** at the time it is being used for the public".

In Chicago R. R. Co. v. Tompkins, 176 U. S., 167, 173, this Court again referred to the analogy of condemnation proceedings and said:

> "It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property

> shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the Act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals."

In Minneapolis R. R. Co. v. Minnesota, 186 U. S., 257, the Court again affirmed the doctrine of Smyth v. Ames, that just compensation was "**a fair return upon the value** of that which it employs for the public convenience."

The most recent statement of the rule is found in Atlantic Coast Line R. R. Co. v. No. Carolina Corp. Com., 206 U. S., 1, where Mr. Justice WHITE said (p. 24):

> "In a case involving the validity of an order enforcing a scheme of maximum rates of course the finding that the enforcement of such scheme will not produce an **adequate return** for the operation of the railroad, in and of itself demonstrates the unreasonableness of the order."

In the same case, he speaks of rates "*as a whole adequately remunerative*," and again, of an order "*for a wholly inadequate compensation.*"

The threefold iteration of the word "*adequate*" is significant.

A composite statement of this Court, therefore, is that legislative rates, to be constitutional, must yield a "compensation" that is "full," "fair," "just," "reasonable" and "adequate" and one that is not less than the "market value" of such use.

Of course, as pointed out in the Covington Turnpike Case, *supra*, there is no rule of law that there must be a return *upon the capital stock*, for the capital stock may be fictitious; nor is there any fixed rule that there must be a return upon *original cost*, for this may be largely in excess of present value. The only rule of the Court is that the fair present value shall yield a fair and full

return, and whether it does so is a judicial question, even though the primary declaration of the Legislature creates a presumption of reasonableness.

In view of recent developments, we need not emphasize to this Court that any other rule would not only work injustice in individual cases, **but would be a public calamity.** It would largely nullify the Fourteenth Amendment in rate regulation cases. Rate regulations, often passed under the pressure of public clamor and with little opportunity of defense by the public service corporation, would simply be so adjusted as to yield a slight return in order to be immune from judicial review. To the unfortunate investor, it would matter little whether his property was totally confiscated or whether his company received but one per cent. upon the fair value of his property, *for so small a return could yield no dividends whatever*, and thus the investors in public service corporations, whose holdings aggregate many billions of dollars, would, for all practical purposes, be beyond the great protective power of the Fourteenth Amendment. That this Court, after the developments of the last two years and under present conditions, should declare this to be the law, is to us inconceivable.

In the very recent and important rate case of Central R. R. Co. vs. Georgia Railroad Commission (161 Fed. Rep., 995), the Circuit Court well said of a railroad carrier:

> "He must have 'just' compensation. Any schedule of rates is forbidden which produces injustice. **The quantum of injustice is immaterial. There must be 'no injustice.'"**

It is true that the rule for which we contend does impose upon the Judiciary in rate cases the same burden as in condemnation cases, of determining what is full compensation for property taken, and undoubtedly this important duty is "difficult and perplexing." But, as was stated by this Court in Chicago Ry. Co. vs. Tompkins, 176 U. S., 167, 172:

> **"This difficulty affords no excuse for a failure to examine and solve the questions involved.**

* * * **Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the Courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution.**"

In Southern Pacific R. R. Co. v. Commissioners, 78 Fed. Rep., 261, Mr. Justice McKenna thus forcibly stated the question:

"When the power of judicial review was asserted and entertained, the Fourteenth Amendment of the Constitution was bound to be firmly and accurately applied. There could be no middle ground. Middle ground would satisfy neither legislative prerogative nor judicial prerogative. Certainly not the judicial prerogative. That must apply justice as it is understood of men, and, in its clear light, it was inevitable that it would come to be seen that the Fourteenth Amendment of the Constitution would be a composition of delusive words if it forbade only the taking of the physical property, while it permitted the taking of its value,—if its guaranties of the law's equal protection to all persons would be satisfied as to railroads by leaving them a microscopical profit. If so, the pool of Tantalus would lose its force to illustrate excited and disappointed expectation when compared with the organic law of this great land. We should keep in mind that the regulation of a railroad affects, in reality, the natural persons who own it, not the insensible, legal artificiality and abstraction called a 'corporation'. For the natural persons the protection of the Constitution is intended, and would any one say that justice is done them if their investment be allowed only an infinitesimal fraction of 1 per cent., while all other investments are expected to return, at least, legal interest, with freedom, besides, of unlimited advantage."

of fact (*supra*, pp. 45–65).

The lower Federal Courts and the highest Courts of some of the States have so far developed a legal rule as to hold that the maximum return must not be less than the legal rate of interest.

For this rule there is ample justification. Usury laws are simply maximum charges for the loan of money. The authority of the State as to them is precisely the authority of the State as to the maximum charges of public service corporations. In each case the justification is the prevention of extortion. Beyond that the State is powerless to interfere in that which is essentially a matter of private contract. The liberty of contract gives the borrower and the lender full freedom to contract between themselves for the loan of capital, subject only to the power of the State to prevent extortion. The maximum legal interest, therefore, is the legislative declaration of a rate that is not unreasonable and within which the borrower and the lender have full freedom of contract. In Lake Shore v. Smith (*supra*, p. 52), this Court has ruled that the legislative rate is *prima facie* a reasonable rate and that while the Company cannot go beyond it, yet within it

> " it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success ".

We have, then, a legislative declaration that for the ordinary loan of money upon collateral, six per cent. is legislatively reasonable and that the borrower and the lender are at liberty to contract for at least that sum. If this be true of the ordinary loan of money, it is doubly true of an investment in a public service corporation, which in a sense is a loan of capital to a public enterprise. There are, however, at least two important differences between the two, which strengthen the legal rule that the investor should not receive less for the use of his money than the ordinary creditor.

(1) The creditor has no further labor than the exercise of judgment in the selection of his collateral. With him, to use the phrase of Aristotle, " money breeds itself."

Those, however, who unite in a public service corporation to serve the public, add to the mere use of money all the resources of science, industry and business sagacity to serve the public interest.

In Brunswick Water District v. Maine Water Co., Mr. Justice SAVAGE well said :

> " Those who engage in a public service cannot be put upon the same level as those who make mere investments. They are not like the depositors in a savings bank, whose right to draw out is limited to precisely what they have put it, with its earnings. They are, on the contrary, engaged in a business, with the ordinary incidents of a business, with some of the hazards and the hopes of a business. To be successful, they must be wise and prudent, thrifty and energetic. These virtues, if they have them, they impress upon the property, making it more valuable than it otherwise would have been. Is it to be said that they can have no return for skill and good management ? We do not think so. They are entitled to charge reasonable rates. (Beale and Wyman on R. R. Rate Regulation, Sec. 401.) "

(2) A better reason, however, is that the ordinary creditor, in the case of a call loan, can withdraw his money at will and, in the case of a time loan, can, upon the maturity of his obligation, withdraw his money for any more profitable use which may present itself. The money which is contributed to the capital of a public service corporation, on the contrary, remains permanently dedicated to that use. Practically it cannot be withdrawn, and if in the progress of society the use is superseded by a better use, the investor may not recover more than a fraction of his investment. The property of a gas plant is at the hazard of any inventor who may be able to supply a better means of illumination. As gas succeeded oil and as the electric has materially lessened the demand for gas, similarly a superior illuminant may at any time be discovered, which will supersede the use of both. It is well known that upon this problem distinguished scientists are working in all

the laboratories of the world, and many believe that the wonderful discoveries in radio-active substances will yet result in an illuminant produced at little cost and without heat.

It therefore follows that the maximum rate for the hazardous use of money cannot reasonably be less than the maximum rate for an ordinary loan on good collateral.

The legal interest rule has been recognized in a number of cases. In Brymer v. Water Co., 179 Pa., 251 :

> " They are entitled to a rate of return, if their property will earn it, *not less than the legal rate of interest ;* and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, *provide a suitable sinking fund for the payment of debts* and pay a fair profit to the owners of the property, cannot be said to be unreasonable ".

The same Court reaffirmed this ruling in the very recent and important case of Pennsylvania R. R. Co. v. Philadelphia County, 220 Pa., 100, 115, where the Court passed upon the validity of the two-cent rate law of that State. The Court said :

> " What was said in Brymer v. Water Co., 179 Pa., 231, was that the company was entitled to a fair return, not less than the legal rate of interest. *In naming the legal rate the court was naming a minimum not maximum rate. Six per cent. is the legal estimate of the legitimate profit from the ordinary safe use of money.* No business man in 1846, even if now, went into a new and extensive venture of uncertain outcome without the hope of more than common interest. Because his judgment or foresight was good is no reason that he should be shorn of his profits in the result."

In Chicago Union Traction Co. v. State, 114 Fed. Rep., 557, 561, where the valuation of corporate franchises for the purposes of taxation was under consideration, the Court said :

> " Several other elements in a fair calculation, based on net earnings, have raised questions to which we have given

careful consideration. The first of these is upon what rate of the true net earnings the aggregate value of the property should be capitalized. We have fixed the rate at *six per cent.* That is the rate adopted in States where assessments are made upon the basis of net earnings. It is less than the rate that some advanced advocates of municipal ownership are willing to guarantee to investors in securities of this character".

In Louisville Ry. Co. v. Brown, 123 Fed. Rep. 946, the Court said as to maximum railroad rates (p. 951):

> "I think it will be conceded that as long as the rates are reasonable and do not unjustly discriminate, the Company is entitled to earn some amount, and it seems reasonably clear to me that if entitled to earn something, under the above conditions, it is entitled to earn, under the same conditions, *a compensatory amount equal at least to the usual and legal rate of interest in the locality where the railroad is situated*".

In the very recent case of Central R. R. of Georgia v. Alabama, 161 Fed. Rep., 925, the Circuit Court, in its exhaustive opinion upon the Railroad Rate Law of that State, adopted the "legal rate of interest rule". Judge JONES said:

> "The best standard which the courts and business men have been able to find for testing such questions is to ascertain whether, when the service is done at just and reasonable rates, the carrier obtains for the service as a whole a fair return upon the value of all the property employed in the business. The courts have, therefore, generally taken as the standard of proper return the legal rate of interest, contrasted with the current rate of profit from the use of other property in like kinds of business. While the percentum of profit allowed upon loans of money between private individuals is not, in many respects, a fair standard for determining just profits from the use of other kinds of property under conditions of greater hazard, yet the rate is the result of long experience, and is tantamount to a legislative declaration that such measure of profit is in general a just return upon investments in property. The evidence shows that the cur-

> rent rate of profit upon property used in business enterprises similar to railroads gives a net income, upon the value of such property, not lower than 8 per cent. per annum Whether we take the legal rate of profit by way of interest on loans of money, or the rate of profit which common experience shows to be the average, and, therefore, approximately a just return from the use of other forms of property, both modes lead to the same result."

In Milwaukee Ry. & Lt. Co. v. Milwaukee, 87 Fed. Rep., 577, 585, four and five-tenths per cent. was held confiscation.

In Columbus Lt. Co. v. Columbus (Referred to by the Master, Record, p. 207), the Master allowed, and the District Court confirmed, a finding that "*at least six per cent. should be allowed*".

In Southern Pac. R. R. Co. vs. Com., 78 Fed. Rep., 236, 261 (*ante*, p. 86), Mr. Justice McKenna said:

> "All other investments are expected to return *at least* legal interest with freedom besides of unlimited advantage."

In People *ex rel.* Water Supply Co. v. State Board of Tax Commissioners, the Appellate Division of the Supreme Court of New York for the Third Department, in a case involving the true assessment of a special franchise tax, repudiated the reasonableness of a five per cent. return for a public service corporation, and said:

> "Six per cent. should then be deducted as a fair return upon the value of the real estate and other valuable property. The surplus earnings should then be capitalized at six per cent. and the result represents the fair value of the intangible rights in the streets, to which rate should be added the value of the tangible property in the streets, and the result represents the value of the special franchise."

In Spring Valley Water Works v. San Francisco, 124 Fed. Rep., 598, the Court held that

> "The weight of evidence is clearly in favor of a rate *not less than six per cent. per annum*",

and therefore held 4.40 per cent. to be confiscatory.

In International Bridge Co. v. Canada Southern Ry. Co., 7 Ont. App., 226, the Court of Appeal of Canada passed upon the reasonableness of the tolls charged by a Bridge Company. The Court, after agreeing that the creation of a sinking fund to safeguard against possible casualties to the bridge was reasonable, added:

> "To speak of six per cent. upon capital laid out in such an enterprise, is *most unreasonable.*"

This decision was affirmed by the highest judicial authority of England (8 Appeal Cases, 723).

In that case the hazard of the capital, due to the possibility of an accident to the bridge was recognized, and the Court by way of illustration referred to the great disaster which befell the bridge across the Tay.

A gas company operating in a large city *and especially in a congested city like New York,* is subject to as great a hazard as any bridge company. Gas conduits and electric wires are necessarily laid in close proximity and the consequent danger is recognized by the most competent gas engineers. That such danger is not imaginary can be illustrated by the immense damage done to the Boston Gas Companies by an explosion, which destroyed a large number of lives and much property. The gas business, therefore, is more hazardous than a water company or turnpike company or even a bridge company. It bears a close analogy to a railroad or steamship company, where the accident of a day, against which the highest engineering talent cannot wholly guard, may consume the profits of many days or even years.

The State of New York has uniformly recognized that a public service corporation should receive more than six per cent.

A return not exceeding 10%, with a reserve fund of 10% of the capital in addition, was recommended for *this Company* by the Senate Committee of 1886 (Complainant's Exhibit 227, Record, pp. 5325, 5388).

The New York Mutual Gas Light Co., by its Charter from the Legislature, is permitted to earn 10% dividends, and to share with its customers any earnings beyond that point (Chap. 651 L. 1866, Comp. Ex. 239, Record, pp. 1854, 5292).

The lowest rate assumed, by the Stevens' Committee of 1905, was 8%.

And likewise the Gas and Electric Commission in 1906, found that 8% was a reasonable return upon the actual value of the property owned by the Company and used in the manufacture and distribution of gas (Bill of Complaint, Record, p. 33; Opinion admitted in Answer).

Most significant is the provision of the "Railroad Law" of the State of New York. It provides (§ 38) that the Legislature may, from time to time, alter or reduce the "rate of freight, fare or other profits upon such roads;" but that the same shall not, without the consent of the Corporation, be so reduced as to produce with such profits "*less than* 10% *per annum on the capital actually expended.*

Aside from the evidence of this Section as to the Legislative view of the "fair and reasonable" rate of return allowable to a public service corporation, could it be said that the Complainant was receiving the "equal protection of the laws," if it should be limited to a lower return than other public service corporations, with no ground whatever evident for such a discrimination?

In Massachusetts, the Legislative Committee of 1900, in discussing the situation of the New England Gas and Coke Association and the dividend, which might be permitted to be paid by it if brought under the jurisdiction of the Gas Commission, referred to such return as "*the* 10% *heretofore recognized by custom*" (Bemis, Record, p. 2541; Mass. House Document, No. 1405 of 1900).

Even municipal plants in Massachusetts, owned and operated by public capital, which customarily receive and expect a lower return than private capital, are permitted to return as high as 8 per cent. upon such capital, in addition to setting aside a sinking fund for existing obligations and three per cent. for a final renewal fund (Revised Laws Mass., Vol. 1, Ch. 4, § 22).

Even in England, where the return expected upon capital is substantially lower than in America, Gas Companies pay dividends from eight to ten per cent.; and, among others, Mr. Marks, the

chief witness and expert for the appellants, admits that the three Metropolitan Companies of London pay an average of $8\frac{24}{100}\%$ on their capital (Record, p. 2097).

It is stated in the report to the Committee of 1886, that the South Metropolitan of London was at that time paying 12%.

It would unduly expand this brief to attempt any adequate summary of the expert testimony given in behalf of the appellee to sustain its claim of a return of 8% to 10%.

Dr. Humphreys, probably the most experienced gas engineer in this country, and a witness for the appellee, testified from a large practical experience in the appraisal and purchase of gas properties as well as from a special study of the subject, that 10% is a fair return upon the investment of a gas company (Record, p. 1689).

Messrs. McMillin, Halsey and Bertron, gentlemen not only well acquainted with matters financial, in general, but with exceptional experience in dealing in public lighting securities, testified that investors will not advance capital to purchase gas properties, unless they can see a present or reasonably immediate *earning* power of at least 10% on the *purchase price;* and such price includes of course not only *tangible* property but any franchise and good will, which go to make up the entire value of the going concern (Record, pp. 1697, 1765–1771).

Mr. Bertron, on the general subject pointed out that even the Pennsylvania Railway, which is generally regarded as the standard transportation company in the United States, was earning about 10% on the market price of its shares, then around 140; and that the stock of the Atchison Railway, selling at par, was earning about 12.

Appellants presented no witness to rebut the testimony of Messrs. Humphreys, McMillin, Halsey and Bertron, as to the rate of earning, which must be visible on the investment to induce the investor to embark his capital in the enterprise.

They presented a schedule, showing that on the market value of certain selected gas stocks the net return *paid* to the investor was less than 5% in many instances. Mr. Whitney, in his brief (p. 142)

for the Public Service Commission, admits that such market quotations are so affected by special considerations as to be of little, if any use.

The fallacy of such market quotations is obvious. The market price of a stock is dependent upon the earning possibilities of a Company far more than its present distribution of dividends. The stock market, usually optimistic, always discounts the future by paying more than the dividend value in the hope of larger dividends or other advantages. Moreover, the market price is necessarily affected by the surplus of a corporation, and often by the strategic importance of the Company in a given locality. The Appellee's experts analyzed this schedule and showed some of the special circumstances which caused the securities of different localities to sell temporarily at a price which, in dividends, yielded a small return of five per cent. It is, however, unnecessary to repeat this analysis in this brief, for this Court will not decide the question on what Judge HOUGH happily called "the vagaries of speculation."

As the Master has stated (Record, p. 255), Dr. Marks, the chief expert for the Appellants below, "expressed the view that a *dividend rate* of 8% was fair" (Record, p. 2037).

It was also shown that the Boston Consolidated Gas Company by a recent Act was authorized to pay 7% dividends with gas at 90 cents; but it may increase its dividends to *8% or anything higher*, if and when it is able to reduce the price of gas 5 cents per thousand feet for each additional 1% of dividend.

In very rare instances has the Massachusetts Commission reduced the price of gas, where a Company was then paying less than 10%, and in each such instance the Commission has felt it necessary to explain in a written opinion the special and peculiar reasons, upon which is based its action (Dr. Humphreys, Record, p. 4723; copy of Opinions). The action, in no case, was based on the general proposition that a well managed and reasonably capitalized Company, was entitled to earn less than 10%.

Complainant has never paid excessive dividends; the most that it has ever paid in any calendar year under the old rate is 8½%. It

has paid as low as 3%; it is now paying at the rate of 4%; and for the entire period of its existence it has under the old rates paid only a fraction over 6% (Complainant's Exhibit 83, Record, p. 5034). To pay an average dividend of even 8%, it must be permitted a maximum earning power of at least 10% in good years. From 1884 down to the hearing before the Master, the stockholders of Complainant have received in dividends an aggregate sum *less by over $11,000,000* than would have been required to pay average dividends of even 8% during that period (Complainant's Ex. 84, Record, p. 5036), and an even greater deficit below 8% (exact figures $10,401,671.50) appears if we consider only the period up to 1900, when *the capital of the Company was first increased* from the original $39,078,000, at which it was fixed at the time of consolidation in 1884.

A small surplus, much less than the deficit below 8% dividends above shown, was accumulated by the Company; but within every one of the last six years it has been drawn upon to pay dividends, the earnings of the Company being insufficient to pay even the moderate ones declared. Stockholders thus merely took "their own," which they might have distributed to themselves earlier. Thus for the year ending October 31st, 1905, *the Company under the old rates failed to earn its dividends by $2,005,552.62*, and drew that sum from surplus to make up the deficit (Complainant's Ex. 95, Record, p. 5052); so that Complainant's total surplus appeared on October 31, 1905 at $1,546,697.38 (Complainant's Exhibit 80, Record, p. 5033) or less than $74,000 per annum in the 21 years of the Company's operations, being only 1.03 cents per thousand on the total sales of the Company for that period.

If these results have followed under the old rates, what would have resulted if the earnings had been reduced 20% by the reduction of $1.00 to .80 per cubic thousand?

X.

The basis of calculation is the present value of the property and not its original cost.

An argument was addressed in the Court below, which in its last analysis is pure socialism. It contended that the appreciation in the value of complainant's property was an "*unearned increment*", upon which the complainant should be denied any return. It was therefore claimed that the true basis was the original cost of the property.

The complainant Company was formed by the consolidation of six existing gas companies. Among the present real estate holdings of the Consolidated Company are some which were originally acquired by some of the constituent companies as early as 1823, when New York City was little more than a village. During all these years the Company has held this property, having at all times the legal right and the opportunity to convert it into cash at the steadily enhancing prices of real estate due in part to the extraordinary growth of the City of New York. It is now seriously claimed that the rate should be fixed upon the cost value of this property in 1823, and not upon its fair present value.

Mr. Whitney's brief for the Public Service Commission illustrates this socialistic idea of State regulation, by an illustration set forth in full on page 200 of his brief. He imagines two gas companies starting with separate locations of equal value. One plant, with the changes incident to the growth of a community, increases in value, while the other remains stationary. Other things being equal, he then asks whether the fortunate company is entitled to a higher price for gas by reason of such appreciation in value than the less fortunate company.

We confess that if this argument for the legislative equalization of fortunes had been addressed to a Single Tax Society, we

would feel no surprise, but addressed to the Supreme Court of the United States, in a judicial proceeding under the Fourteenth Amendment, we can only rub our eyes and say:

> "Can such things be
> And overcome us as a summer cloud,
> Without our special wonder?"

Why should the Legislature, in preventing extortion in the sale of gas, attempt to equalize improvidence with providence and to deny to the prudent investor and wise business management the profit of their sagacity, or even good fortune, simply because another competitor has been less fortunate? This doctrine in its last analysis is simply an attempt to penalize thrift and to take away one man's property (or what is equivalent, its earning power) because another has not been equally fortunate.

Fully appreciating that this Court has ruled to the contrary by holding that the basis of the calculation is "the fair value of the property being used by it for the convenience of the public." Mr. Whitney proceeds to point out the "fallacy" of this "basis" by asserting that (p. 202):

> "Only so much of the value of the property as was covered by the original investment is really used as capital in gas making. For that purpose the value has never increased."

This certainly is novel doctrine. If the Consolidated Gas Company, through one of its predecessor companies, bought in 1823 a piece of ground for $10,000 and has in the course of years built a plant upon it and the ground is to-day worth $1,000,000, then Mr. Whitney asserts that all that the Gas Company actually uses in the business is $10,000, and not $1,000,000, although as matter of fact, the million dollar property is actually used for the purpose of making gas and is appropriate for such use. This reasoning is worthy of the scholasticism of the Middle Ages.

Mr. Whitney adds, however (p. 202), that we are not wholly denied the appreciation of value, because we can realize on such value *when we sell it*. In the meantime, however, if we are denied a just return on such increased value, it is idle capital in our hands.

Moreover, Mr. Whitney's theory results in a strange paradox. If we devote our property to the public use, we are denied any return except upon the original cost, but if we withdraw it from the public use, we are then graciously permitted to obtain some return upon it in other ways. This theory would effectually put a penalty and not a premium upon public service and radically reverses the theory of public service corporations, under which they are entitled to gain a profit upon what they use and not upon what they cease to use.

Mr. Whitney further says (p. 203) that because we make no claim for a return on the stocks of the Edison Electric Company, the enhanced market value of the real estate stands in no better position. The fallacy of this is obvious, for the stocks of the Edison Company are not employed in the manufacture and distribution of gas, while the real estate in question is.

Still more socialistic in its reasoning is Mr. Whitney's remark (p. 244), that if a company has, under authority of law, made profits and has not distributed them to stockholders in the way of dividends but has re-employed them in the business for the public good, and these facts have not been disclosed to the consumer, such investment of surplus earnings

> "should be regarded as having been contributed by the consumer and not by the company and hence should not be treated as capital for the purpose of fixing maximum rates."

If this be true, then not only can our present property be taken without a reasonable return but profits heretofore paid us, under maximum rates fixed by the Legislature are to be taken from us and treated as contributions of the consumers to the capital of the business. Whether we are obliged to capitalize these invested profits and distribute them in the form of new stock among the con-

sumers, whose contribution it is claimed they are, Mr. Whitney does not say. If this be so, not only is the present and future uncertain for public service corporations, but even the past is not secure.

However convincing this argument might be in a Single Tax Society, it surely can find no place in this last and great citadel of property rights, the Supreme Court of the United States.

Passing by these fanciful and untenable suggestions, we will briefly discuss Mr. Whitney's main proposition, from which they are deduced, that the basis of calculation for rate regulation purposes is not the present value but the original cost.

Such a contention is absolutely without any sanction by this Court. On the contrary, this Court, in the case of San Diego Land Co. v. National City, 174 U. S., 739, 757, thus stated the rule:

> "What the Company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property **at the time it is being used for the public.** The property may have cost more than it ought to have cost and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the Company and to the public."

Again, in Cotting v. Stock Yards Co., 183 U. S., 79, 91, the Court said:

> "It has declared that the **present value** of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered."

Again in Smyth v. Ames, 169 U. S., 547, the Court said:

> "What the Company is entitled to ask is a fair return upon the value of that which it **employs** for the public convenience."

Again in San Diego Land Co. vs. Jasper, 189 U. S., 439, 442, the Court said:

> "It no longer is open to dispute that under the Constitution 'what the Company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property **at the time it is being used for the public.**' San Diego Land Co. vs. National City, 174 U. S., 739, 757. That is decided, and is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses."

Again in Stanislaus County vs. Irrigation Co., 192 U. S., 201, 215, the Court said:

> "After taking such facts into consideration, the Company might still be directed to receive rates that would be nothing more than a fair and just compensation or return upon the reasonable value of the property **at the time it was being used** for the supplying of the water to the public."

The lower Federal Courts have uniformly so understood the doctrine of this Court.

> The owner of property devoted to a public use "is entitled to the benefit of any appreciation in value above the original cost and the cost of improvements, which is due to what may be termed natural causes," such as "improvements made in the vicinity of the property, the growth of the City or town where it is located, the building of railroads, the development of the surrounding country and like causes." The owner would be deprived of the increased value so produced, "by legislative action which prevents him from realizing an income commensurate with the enhanced value of his property."
>
> Thayer, J., in Cotting v. Kansas City Stockyards Co., 82 Fed. Rep., 850, 854.

> If the property "has since enhanced in value, those who invested their money in it, like others who invest their money

in other kinds of property, are justly entitled to the benefit of the increased value," in determining a reasonable rate of return upon the investment.

San Diego Land & Town Co. v. National City, 74 Fed. Rep., 79, 83 ; Affd. 174 U. S., 939.
San Diego Land Co. v. Jasper, 89 Fed. Rep., 274, 281.
San Diego Land Co. v. Jasper, 110 Fed. Rep., 702, 714.

That the Company loses a return upon any depreciation in value is reasonably settled. "It is a poor rule that does not work both ways," and therefore a return on the appreciation of value necessarily follows.

We invite the earnest consideration of this Court to the irreparable damage which would be done to railroad investments in this country, if the doctrine for which the Appellants contend were sanctioned by this Court. Billions of dollars are invested in railroad properties and there is insistent public demand for a revaluation of railroad properties as the basis of determining the reasonableness of their charges. Most of these railroads have been built for many years and some, like the Baltimore & Ohio, for nearly three-quarters of a century. Many of them occupy in part their original roadbeds and still use in part their original terminal facilities. If these are to be valued on the basis of their original cost, there will be a destruction of values which may justly be compared to the San Francisco earthquake. If capital is freely loaned to these corporations on the basis of the present value of their property, why should this Court hold that while, in determining the reasonableness of railroad rates their fixed charges must be recognized, nevertheless the rates may only yield a return upon the original cost of the property?

Certainly the economic phrase "unearned increment" can be applied with poor grace to the railroads, for manifestly they have not only in great part created the enhanced values which they themselves enjoy but have immeasurably appreciated the property holdings of the community. This is also true of gas companies, for if their real estate holdings have grown in value with the

growth of the community, it is equally true that the real estate holdings of every citizen have been immeasurably enhanced by the ability of the owner to have such indispensable conveniences of civilization as light, water and power.

XI.

The costs were properly imposed upon the respondents, including one-half thereof upon William S. Jackson, as Attorney General of the State of New York.

It is not seriously questioned that the costs in this expensive litigation should have been imposed upon the respondents. The State, to the prejudice of the complainant's property rights, has enacted certain unconstitutional legislation, which, even with the collection of these costs, will impose a very heavy burden of expense upon the complainant company. The complainant has sustained its contention in all respects and has established to the satisfaction of the Court that its property rights have been invaded by a violation of the Fourteenth Amendment. Under the circumstances, it would have been most inequitable had the costs not been imposed upon the defendants.

It is claimed, however, that so much of this decree as imposed costs upon William S. Jackson, as Attorney General of the State of New York, is erroneous. It is obvious that either William S. Jackson, as an individual or in his official capacity, must bear his proportionate share of the burden of a losing litigation. As he was conducting the litigation for the supposed benefit of the State, it would be more equitable if the State should assume the burden imposed upon him. Under ordinary circumstances, this would

give rise to a debatable question whether if the suit be not a suit against the State, the State can in turn be made to pay its proportionate share of the expense.

But in the case at bar it is not necessary for this Court to determine this question, for we have already shown (*supra*, pp. 33 and 34) that when the Attorney General entered a general appearance as "Attorney General of the State of New York" and filed an answer which took issue with the complainant on the merits, he, under the authority of Gunther v. Atlantic Coast Line, 200 U. S., 273, waived any immunity which the State might have otherwise enjoyed and thereby made the State responsible for its share of the costs in attempting to enforce an unconstitutional Statute.

XII.

The Circuit Court was without power to make relief from an unconstitutional statute conditional upon the acceptance by complainant of a new rate to be fixed by the Court.

Counsel for the Public Service Commission by their XV. Point (p. 286) ask that relief be granted us on condition that we accept a rate, not fixed by either Legislature or Commission but to be fixed by the Court. They therefore asked the Court to fix a rate, by threatening to deprive the Company of part of its property unless it consented to the rate as so fixed. This the Court had no power to do. The power of the court, in a case of this kind, is limited to ascertaining whether an established rate is reasonable. If it finds that it is not reasonable, the legislative Act establishing it must be declared void. The court has no power to fix the rate which, in its judgment, would be reasonable, as such power is ex-

clusively legislative. The court cannot, therefore, refuse relief except on condition that it shall be allowed to do that which the law says it has no power to do.

Cotting v. Kansas City Stockyards Co., 82 Fed. Rep., 839, 845;
Western Union Tel. Co. v. Myatt, 98 Fed. Rep., 335, 342-3;
Chicago etc. R. Co. v. Wellman, 143 U. S., 339, 344;
Reagan v. Farmers L. & Tr. Co., 154 U. S., 362, 397, 399;
Steenerson v. Great Northern R. Co., 69 Minn., 353, 375;
State v. Sioux City &c. R. Co., 46 Neb., 682, 702;
State v. Johnson, 61 Kan., 803, 817;
San Diego Water Co. v. San Diego, 118 Cal., 556, 581.

The maxim, "He who seeks equity must do equity," invoked by the appellant, has no application to a case of this kind but only to those cases where the granting of equitable relief is *within the discretion of the court.* The maxim, "Equity follows the law," is superior, in the present case, to that invoked by the appellant. Equity must follow the law; and courts of equity have no greater right to disregard contract relations or statutory or constitutional provisions than have courts of law. The constitution of the United States is the supreme law of the land and is binding on all judges alike, whether sitting in equity or at law. No discretion whatever is vested in courts of equity, in a case involving the constitutionality of a statute. If, on the facts found, a law is unconstitutional, the court must declare it void; and it has no discretion in the matter.

Magniac v. Thomson, 15 How., 281.

In that case, the Court stated it as a postulate or legal truism, "admitting of no dispute", that (p. 299):

> "Wherever the rights or the situation of parties are clearly defined and established by law, equity has no power

to change or unsettle those rights or that situation, but, in all such instances, the maxim, *equitas sequitur legem*, is strictly applicable."

If an Act of the legislature, by its extreme terms, deprived a citizen of his liberty or inflicted cruel and unusual punishments, it would not for a moment be contended that any court under our system of jurisprudence would have power to require him to agree, as a condition of having the law declared void, to submit to such punishment or conditions as the court might consider reasonable. The point has been passed upon by this Court.

Hedges v. Dixon County, 150 U. S., 182.

In that case, suit was brought by the holders of a large number of bonds issued by Dixon County, where the constitutional limit had been exceeded and where the bonds were, therefore, not enforceable at law. The complainants asked the court to determine how many bonds were issued in excess of the constitutional limit, to declare bonds to that amount held by the complainant void and to enforce the liability of the County on the remaining bonds. Held, that as the power of the Court was limited by the constitution, the issue of a greater number of bonds than was authorized rendered all of the bonds void and that a court of equity had no jurisdiction, as the transaction, being void at law, was equally void in equity; and in discussing the principle involved, the Court said (p. 192):

"Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident or mistake, to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law; and where the transaction, or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof."

The business of the Appellee is not interstate commerce and it is, therefore, beyond the sphere of federal legislation. The rate can be prescribed only by the state legislature. But neither the federal government nor any of its departments is permitted in any manner to exercise a state function. In other words, even if a judge of the state court had the undoubted power which the defendants asked the trial Court to exercise, yet the fact that the Court is here only applying the Constitution and is without general jurisdiction shows its want of power. To require the complainant, as a condition of declaring these statutes void, to assent to a rate fixed by the Court, would be

> "an invasion by the judiciary of the federal government of the legislative functions of the state government. It is a most extraordinary request; and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."
>
> Heine v. The Levee Commrs., 19 Wall., 655, 661 (MILLER, J.).

XIII.

The Circuit Court properly assumed jurisdiction of this controversy.

This brief was necessarily prepared without the advantage of seeing the full and very able brief of the learned counsel for the Public Service Commission (herein referred to as Mr. Whitney's brief), which, in substantial interest, is the chief Appellant. Its brief was not served upon us until October 23rd, at which time it was impossible to reconstruct this brief so as to follow the points in Mr. Whitney's brief in the order in which they are made. We believe, however, that this brief on the law, together with Mr. Garver's brief on the franchises and goodwill and also Mr. Mathewson's brief on

the facts, have anticipated and fully answered every pertinent question—whether of law or fact—advanced by Mr. Whitney. One feature of his brief seems to justify a further answer, and that is the repeated and continuous attack upon the propriety of the Federal Court's assumption of jurisdiction in this controversy.

Mr. Whitney does not and can not suggest that this court is without jurisdiction, for he concedes that as the ultimate question involved is the application of the Fourteenth Amendment, that the controversy presents essentially a federal question. Nevertheless, he vehemently expresses his opinion that the enforcement of the Fourteenth Amendment in this case should have been left to an administrative tribunal whose decision should have been a finality. In his Third Point, (page 175), Mr. Whitney also asserts that the Federal Court should have declined jurisdiction and remitted it to the state courts. He claims that this should have been done upon the ground that the controversy is not (page 177)

> " one of so grave a nature as warrants the interposition of the federal power in purely local affairs,"

as if the application of the Fourteenth Amendment was a purely local affair and as if the confiscation of the earning power of a business, whose assets according to the findings of the Circuit Court amounted to nearly sixty millions of dollars, was not " grave " in its character. He asserts that the state courts have some superior power to (page 177) " confine the record within the limits of reason and intelligibility," and therefore that the federal courts are incapable of trying the case within such limits. His attack, however, is not only upon the federal judiciary, but upon the assumption of jurisdiction by any court, state or federal. He states, page 177, that this is

> " a question between one man in a gown and three or four men without gowns,"

and he believes that

> " the majority of thinking people, taking the general average rather than any particular case, would consider a commis-

> sion as the best qualified, a Judge as the next best and a legislature as the least."

As the rates now under consideration are purely *legislative* rates, this concession does not advance the Appellant's argument.

Mr. Whitney then proceeds to demonstrate the inferiority of the Federal court in determining the application of the Fourteenth Amendment to that of a state commission by asserting (page 178) that the man in the gown

> "can give but a limited time to the hearing of the case,"

and that therefore counsel have not adequate time to argue the case.

The record in the present case is a striking exhibit of the relative fairness of legislative and administrative bodies and the judiciary. The Stevens Legislative Committee of 1905 refused to recognize the *right* of counsel for this Company to be heard in the investigation, and limited counsel in showing the Company's side

> "to such brief additional questioning or data as the courtesy of the Committee permitted."

At its conclusion, any opportunity to argue the questions involved orally was denied. Its investigation of all the companies, gas and electric, lasted only three weeks.

Still more striking is the comparison between the care taken by the Gas and Electric Commission of 1906 on the one hand and the Circuit Court upon the other. The former investigated all of the gas companies of Manhattan *in less than three months*, while the Master appointed by the Circuit Court took testimony for over seven months, and considered the matter for four months more before filing his report. Mr. Whitney complains that a Court does not give counsel sufficient time in this class of cases. The fact is that Judge HOUGH gave nearly a week to the oral argument of this case.

Mr. Whitney, on page 262, does not regard it as

> "seemly that a single man, whatever be his title and by whomsoever elected or appointed, shall have general appel-

> late jurisdiction over a tribunal of specialists established by a state—a judgment practically final upon questions of fact, for is this Court able to read the record or its work?"

He is of opinion that injustice by state tribunals will be fully corrected by the consequential damage done to its general prosperity, for he says,

> "a State which does not treat its corporations fairly will soon suffer and soon repent, and will not the education which it will have received compensate in the long run for the temporary loss that investors will have suffered?"

We admit that the developments of the last few years have been an "education" in the matter of arbitrary action by the states in confiscating the earning power of corporations, but we fail to see how such "education" can afford any compensation or even consolation to the unhappy investor for his loss, which is permanent and not, as Mr. Whitney intimates, merely "temporary."

Whatever may be said as to the comparative ability of the federal judiciary and a state tribunal to intelligently determine when the Fourteenth Amendment is violated—and, as Mrs. Malaprop says, "comparisons are odorous"—there is one manifest advantage of the judiciary over an administrative tribunal, and that is in the impartiality of their judgment. The judiciary is trained by habit and tradition to hold the scales of justice even, but an administrative tribunal is not only Court but prosecutor as well, and it would be unnatural if the same man or body of men could be both litigant and Judge without affecting their judicial poise. Moreover, it cannot be ignored that an administrative bureau necessarily desires to satisfy public opinion—often ill advised—and to please the electorate. This is admirably illustrated by the Gas Commission of 1905, which prescribed this 80 cent rate. They conducted their all too brief deliberations under the pressure of newspaper clamor, which vehemently insisted upon 80 cent gas. While they were considering the rate and before the gas company had presented any evidence, the then

Governor of the State of New York (who appointed the members of said Commission) recommended in his message the passage of an 80 cent gas bill. As the Commission was a part of the Governor's administration, the effect of this executive policy could not have been negligible, but this recommendation was promptly followed, when a bill was introduced in the State Legislature to carry the Governor's recommendation into effect. This was followed, before the Commission reached its conclusion, by the introduction of another bill by Senator Stevens, Chairman of the Legislative Committee of 1905, to abolish the Commission altogether. All these facts will be found in the record. (See Carter's testimony.)

We do not question the motives of the officials to whom reference has been made; we have no question that they sincerely and honestly believed that 80 cent gas was due to the consumer, but when we see an administrative tribunal, reaching a finding under pressure of this character, we must emphatically dissent from the claim that such a tribunal has superior qualifications to the federal judiciary in enforcing the Fourteenth Amendment.

Our preference in litigating our rights under the Federal Constitution in the Federal courts is further strengthened by the rules of evidence which Mr. Whitney, as the legal representative of the Public Service Commission, lays down as the true method of determining the compensatory or confiscatory character of a rate. If we are remitted to the tender mercies of Mr. Whitney's favorite tribunal, it is reasonable to assume that we will be confronted with the rules of testimony which its distinguished counsel has laid down. These rules are (page 187):

> 1. The burden of proof to establish the non-compensatory character of a rate is upon the public service corporation, which must prove every fact in its own relief.
>
> 2. The corporation must therefore prove the value of its property, (which can only be done in part by expert testimony,) BUT
>
> 3. No expert testimony can be given by the gas company because a rate "cannot be declared unconstitutional

> became persons employed and paid by complainant swear * * * that in their opinion certain valuations ought to be given to certain pieces of property from which valuations the unconstitutionality of the statute would be inferable" (page 210).
>
> 4. As between two unimpeached and qualified expert witnesses, the valuations most favorable to the consumers must be adopted (page 191).
>
> 5. Where the experts for the consumers testify to one value of the property and those for the public service corporation to another, the former must be accepted, "unless the state concedes figures from which the contrary deduction must be made."
>
> 6. A statutory rate "cannot be declared unconstitutional" upon the testimony of experts or employees "unless the state admits its correctness."
>
> 7. Items of value "incapable of exact valuation, must be put down at the minimum amount that a fair minded state board could fix."

Short will be the shrift of a public service corporation if Mr. Whitney's administrative board conducts its proceeding according to these novel and remarkable laws of evidence. In rate regulation cases, the primary question is value, and value necessarily depends to a large extent upon expert testimony, and yet we are told that the courts should refuse the public service corporation the right to call in expert testimony, and that even if it is given the privilege, a conclusive presumption follows that such experts are wrong and that those called by the consumers are necessarily right. If this be so, there is assuredly no "equity stirring."

We cannot believe that it is necessary for us to defend the right of the Federal courts to intervene in this class of cases. Upon this point this Court has spoken in no uncertain tone. In Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362, 397, this Court (page 369) asserts that it is not only the "power" but also the "**duty**" of the courts

> "to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable."

Recognizing the difficulty of this most important duty, it said, in Chicago Railway Co. vs. Tompkins, 176 U. S., 167, 172,

> " this difficulty affords no excuse for a failure to examine and solve the questions involved * * * Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, *no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution.*"

The governmental power to regulate rates, even though demanded by the public interests, is nevertheless in its last analysis experimental state socialism. Its exercise would be intolerable unless the judiciary, as in the past, shall continue to restrain the oppressive use of such power. This truth found felicitous and significant expression in the words of an honored justice of the Court below,* who, on retiring from the bench about a year ago, after thirty years of continuous service, gave to his brethren of the bench and bar this message, as the ripened fruit of his judicial experience :

> " At no time in the history of this nation has the adherence of the national judiciary, to its best traditions of independence and courage, been put to the test so severely as it is likely to be in the days of this generation. The times are near when the courts of this country are to be, more than ever before, the sanctuary of that justice, which consists in administering the law of the land according to the ordained principles of our present form of government. The will of the majority is not law when it transcends the constitutional limitations upon its exercise of power. In many of the States, that will is now threatening the rights of the minority, and has already compelled or instigated legislatures, under the guise of protecting the public interests, to arbitrarily interfere with private business, and to impose unusual and unnecessary restrictions upon lawful occupations. Not a few of the measures proposed invade the freedom of

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* Judge WALLACE.

> the individual to manage his own legitimate concerns without unwarranted governmental domination, and to enjoy the fruits of his enterprise or of his good fortune without the risk of governmental confiscation. Assuming to act under the authority to make reasonable regulations respecting the use of property which has been clothed with a public interest, many legislatures, by establishing tariffs of rates, or imposing new duties or responsibilities upon the owners of such property, have already subjected them to such onerous exactions as practically to destroy the value of their investments."

To defeat this wise exercise of judicial power, counsel for Appellants insist that the judiciary should not declare any law invalid if there be any possible doubt as to its validity. Where the question of constitutionality is purely one of law and not dependent upon the ascertainment of facts, this doctrine has some justification, although as the occasion for the exercise of federal power to defeat socialistic attacks upon property grows greater, the reluctance of the federal courts, in applying the great limitations of the Constitution, has become markedly less.

The doctrine of the exclusion of all doubt must not be taken too literally. This Court has repeatedly adjudged legislation invalid even though the constitutional question (as in the Income Tax Cases) was so difficult and doubtful that the conclusion could only be reached by a divided Court and after repeated arguments. It therefore cannot be literally true that no Statute can be declared invalid if there be any doubt, however unreasonable. If such were the real attitude of this Court, the wise limitations of the Federal Constitution—without which popular government in our heterogeneous democracy would inevitably break down—would be sacrificed again and again to the supposed exigencies of State legislation, especially where the validity of the latter depends, as in rate cases, upon the ascertainment of facts as to which the exclusion of all doubt is in many cases an impossibility.

This Court is as much concerned in the vigor and efficiency of the Federal Constitution as in that of a State enactment. Its great

purpose—so nobly pursued for more than a century—is to uphold in all its vigor and power each part of our dual system of government, and in doing so, it must decide every question as, upon full consideration, seems just. To hold that it can render no adverse judgment in a constitutional cause, unless it can exclude all possibility of error, would be a virtual abdication of its high office: "With firmness in the right," as it is given to see the right, it must enforce in all its vigor and efficacy the wise limitations of the Constitution on state and federal legislative action, and it cannot, if our institutions are to endure, avoid this duty on the ground that the ascertainment of either laws or fact cannot be wholly free from possible error.

The spirit, with which it approaches these great cases, was well expressed by the great Chief Justice in Marbury v. Madison. It was there contended that the sanctity of a statute was such that the judiciary should sustain it at all hazards, as the deliberate act of the people, but MARSHALL said that these advocates of a peculiar sanctity of a Statute are

> "reduced to the necessity of maintaining that Courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written Constitutions. It would declare that the act which, according to the principles and theory of our Government, is entirely void, is yet in practice completely obligatory."

He added impressively:

> "Why does a judge swear to discharge his duties agreeable to the Constitution of the United States, if that Constitution forms no rule for his government; if it is closed upon him and cannot be inspected by him; if such be the real state of things, this is worse than solemn mockery".

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